THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. | S. D. THOMPSON, Ass't Editor. | ST. LOUIS, FRIDAY, NOVEMBER 13, 1874. | SUBSCRIPTION: $8 PER ANNUM, in Advance

ERRATA.—An important typographical error occurred in the article on Seduction, in our issue of October 30th. The last word of the 8th line, p. 539, should read "indispensable," instead of "indisputable." The latter word conveys an entirely incorrect idea,—one at variance with the whole tenor of the note. The allegation of service may, of course, be disputed.

BY a typographical error the name of Judge Dewey, in the article in our last week's issue on the Jurisprudence of Massachusetts, was spelled Demey.

Another error of less importance occurred in making up the last page of our paper last week. The printer inadvertently left out the article from the Western Jurist, on Law Schools, to which we called attention editorially, as being published "elsewhere." We now insert it "elsewhere" in this number.

Speaking of errors reminds us that our brother of the Washington Law Reporter has a proof-reader who is not infallible, and therefore he has been obliged, like ourselves, to publish a table of errata. In correcting some errors which occurred in Justice Olin's opinion in the celebrated soap-factory case —Bates v. District of Columbia—we find the following: "On page 263, 2d column, 2d paragraph, after the word 'knock,' read 'in the head.'" A very material amendment. The printer knocked that sentence so badly in the head that it hadn't any head left.

Compensation of Lawyers—Champerty.

The Albany Law Journal, for September 26, animadverts severely on Voorhees v. McCartney, 51 N. Y. 387, decided by the New York Commission of Appeals. This case holds, according to the syllabus, that an attorney, who brings an action in the name of another, in which he is beneficially interested by virtue of an agreement by which he is to have a portion of the recovery as compensation for his services, is liable, like the plaintiff, for the defendant's costs, and that his liability has not been affected by the provision of the New York code (§ 303) legalizing such agreements. This liability was created by statute, 2 R. S. 616, section 44, which enacts, that in an action brought in the name of another, by an assignee of a right of action or a person beneficially interested in the recovery, such assignee or person is liable for costs the same as the plaintiff.

In the course of this article, the editor of the Albany Law Journal makes some observations on the policy of prohibiting champertous agreements between attorney and client, which are worthy of attention. He says:

> Now, the old statute was a part of a system under which lawyers were viewed and treated very much as malefactors. The legislature and the public seemed to regard them as a class of reprehensible persons, who were not to be paid for their services like other people. If they were permitted to work, it was mainly for the public benefit and behoof, like the convicts in our prisons. It was meritorious to restrict their compensation to a meagre pittance. It was even esteemed by many a venial offence to cheat a lawyer out of his pay. Agreements between attorney and client in respect to the subject-matter of the litigation, were always construed as frauds upon the client. The public were to be protected against these ravening wolves by legislation, and if the costs of a suit could be charged upon the lawyer, it was a joke that made godly persons laugh. But when common sense and the code came in, we tried to change all that. We left lawyers at liberty to make contracts for their compensation like other persons. It is notorious that an immense amount of legal business is now transacted in this state, by the most reputable lawyers, under agreements, precisely like that impliedly censured by the court in Voorhees v. McCartney, although seldom, we hope, entered into under the same circumstances. It is an affectation at this day to frown upon this mode of doing legal business. Indeed, some of our courts have held, that the existence of such an agreement between attorney and client, in a particular case, cannot be proved on the trial in defence, because it is immaterial and may tend to prejudice the plaintiff's case with the jury. Cook v. New York Central Railroad Co., 5 Lans. 501. We can see nothing immoral or impolitic in such arrangements, and we can see no reason for mulcting the attorney in costs because he has chosen to run his risks of getting any compensation for his services in the suit. We think the legislature would do well to look to this matter at their next session, if the case of Voorhees v. McCartney really decides what the reporter seems to think.
>
> The other decision is English. We refer to the action of the Benchers of the Middle Temple in expelling from their membership a barrister who stole some law books. We cite this case, not to condemn it, because we do not see how the benchers could have done otherwise, but to draw public attention to the facts which led to the commission of the crime. The simple truth was, this lawyer was starving for want of employment, and stole these books and sold them to buy bread for himself and another unfortunate in the same predicament. He was sent to prison for six months, and served out his term, and on his release his brethren who had expelled him from their fellowship, presented him with six hundred pounds sterling, and created a fund for the relief of poor barristers. But they could not give back to this unfortunate gentleman his honor. He was a victim to the ideas of professional compensation which prevail in England. A barrister may not solicit patronage; he must wait until an attorney brings it to him, and starve if it does not come. A lawyer cannot make an agreement that his compensation shall depend upon, be measured by, and be paid out of the recovery; that is champertous and immoral, and he must wait for responsible clients. Now is it not a little rediculous, not to say perfectly monstrous, that in the largest city and the most enlightened and wealthiest nation on the globe, a gentleman of education and culture, a member of the higher branch of the most influential of the learned professions, is reduced by fashion's caprice, and by the absurdity of the laws, to such an extremity, that he must starve, go to the alms-house, or steal? We applaud the humanity of our English brethren. We should have liked to contribute our mite to the fund for the relief of that most unfortunate lawyer. But we should like still better to be able to aid in bringing about a reform of their customs and their laws, so that a probability should exist that such a thing could never occur again.
>
> We hope our readers see the connection between these two cases. Legislation can never keep the relations between attorney and client pure. Lawyers and suitors must be left to deal with each other, like other persons of common sense and ordinary experience. Suitors will occasionally be fleeced by dishonest lawyers, but where one such case occurs, nineteen lawyers will be cheated by dishonest clients. There is a great deal too much of this sentimental nonsense in regard to the members of the learned professions. A physician must not advertise; a clergyman must not care for the amount of his salary; a lawyer must not have any pecuniary interest in the result of his client's cause. We had supposed that the sturdy sense of our profession, in this state at least, had weeded out this last idea. We knew it was legally extinct; we hoped it was morally defunct. But when a high judge stigmatizes the lawyers who accept retainers in the way to which we refer, as "speculators," and implies that they are "intolerable," we confess we fear the old folly is not quite dead. It is these ideas that lead to such tragedies as we have recorded in the case of the London barrister. They are "too good for human nature's daily food," at least for that portion of our profession who are still at the bar, and who expect from those of their number whom they elevate to the bench, and there maintain on comfortable salaries, the liberty to gain bread and not stones, fish and not serpents.

—HON. ROBERT A. HILL, Federal District Judge of Mississippi, has written a letter to one of the newspapers of that state, describing a trial of a negro boy, for an assault with intent to commit rape *on* a white girl, and congratulating the judge who tried the case, Hon. Orlando Davis, of the state circuit court, on the impartial manner in which the trial was conducted, and on the fact that a public example was made, such as would allay the public excitement incident to the commission of such an offence, and prevent public justice being vindicated by a mob.

Spies and Informers.

We have read with much interest a pamphlet entitled "Remarks made before the Committee of Ways and Means, in Advocacy of Changes in the Customs-revenue Laws, proposed by the merchants of New York, Boston, Philadelphia and Baltimore (reprinted from the 'minutes,' with additions), by Cephas Brainerd, of New York." That portion of this argument which will have chief interest to the reflective reader, is where Mr. Brainerd proceeds to show that the best writers who have adverted to the subject, have condemned both the justice and the expediency of employing informers in the enforcement of penal laws. We cannot refrain from quoting the language in which he presents the views of several eminent writers:

"Lord Auckland declared himself most emphatically against it in his remarkable treatise. He says (Eden's Principles of Penal Law, 2d Ed., p. 322):

'The first step towards the punishment of offenders is their formal accusation. In all governments which have any mixture of political freedom, this accusation should, as in England, be public. Private informers are the proper instruments only of despotic governments. Every idea of liberty and security is lost, where the ends of justice are suffered to be sought by such means.'

"So, too, Bentham, who gives this reason for his condemnation (On Rewards, p. 161):

The danger lies in the temptation given to such officers to increase their emoluments by increasing the difficulties of those who need their services. The abuse is easily introduced.

"So Colquhoun, writing, out of the fullness of his wide experience as a London magistrate, says:

Many excellent rules are established by the legislature and the magistrates; but while it is seldom the interest of the depraved or dishonest part of these two classes to adhere to such rules, by what means is the execution to be insured, so as to operate as a complete protection to the public? Surely not by the operation of the law through the medium of common informers. Since, independent of the invidious nature of the office, experience has shown that the public good rarely enters into the considerations of persons of this description, who look merely to their own emolument, frequently holding up the penalties as a rod by which money is privately extorted, and the parties laid under contribution for the purpose of allowing them to continue in the practice of these abuses, which the engine used for this nefarious purpose was meant to prevent. Treatise on the Police of London, 1796, p. 191.

"And again (id., pp. 203–204) the same eminent author, after giving a schedule of the rewards offered for the detection and conviction of offenders, says:

These rewards apply to ten different offences, and ought, no doubt, to be a considerable spur to officers to do their duty; but it seems as if there is some radical error in the system. Since, however atrocious most of these offences are which have been selected at different periods by the legislature as objects of reward, it is extremely doubtful whether this measure has not, in some degree, tended to the increase of a multitude of smaller crimes which are pregnant with the greatest mischiefs to society. It is by deterring men from the commission of *smaller* crimes (says the Marquis Beccaria) that greater ones are prevented. * * * * * * * *

While rewards are limited to higher offences, and conviction is the indispensable condition upon which they are granted, it is much to be feared that lesser crimes are overlooked, and the public subjected, in many instances, to the intermediate depredations of a rogue, from his first starting upon the town until he shall be worth £40.

"Colquhoun, in the latest (6th) edition of his famous book, retains the condemnatory language just quoted, and adds the following suggestion as a substitute for the system paralleled by that we here assail (The Police of the Metropolis, p. 393):

By altering the system entirely, and leaving it in the hands of the judge who tries the offence, to determine what reward shall be allowed, with a power to grant or withold, or limit or increase the same according to circumstances connected with the trouble and risk of the parties, whether there is a conviction or not, a fairer measure of recompense would be dealt out, the public money would be more beneficially distributed, so as to excite general activity in checking every species of criminality.

"Beccaria expresses his conclusion as a philosopher, and his indignation as a man, in regard to the system of informers and rewards, in principle like that we now seek to overthrow, in these burning but truthful words (Essay on Crimes, Ch. 36; Ed. of 1767, p. 151):

At one time treachery is punished by the laws, at another encouraged. With one hand the legislator strengthens the ties of kindred and friendship, and with the other, rewards the violation of both. Always in contradiction with himself, now he invites the suspecting minds of men to mutual confidence, and now he plants distrust in every heart. To prevent one crime he gives birth to a thousand. Such are the expedients of weak nations, whose laws are like temporary repairs to a tottering fabric.

"Frederick Hill is the great modern English authority on this branch of penal science. He states the results of the best experience and thought to a very recent date, in the following extract (Vide, Crime: Its Amount, Causes and Remedies, 1853, p. 134–135):

But not only is the police in some places almost a nullity, and in others insufficient in number and too much separated in different parts, but the mode of remuneration, though improved, is still faulty, awaiting no doubt a further progress in public opinion. It is still too much directed to detection, and too little to prevention, thus reserving high rewards till great offences have been committed, instead of making all rewards simply dependent on the small amount of crime. So long as the police receive large premiums for the apprehension of great criminals, it is continually their interest (although many of them are no doubt too honorable to be so swayed) that great criminals should exist; their motive for the extinction of such offenders being scarcely greater than that of a poacher for the extinction of hares and pheasants, and great as is this objection to the practice of offering large rewards, it is not the greatest; for the terrible cases of "blood money" that have sometimes come to light, show that official villains have been found, under the stimulus of these rewards, to get up evidence against persons who were wholly innocent.

By way of climax to the effect produced by these quotations, Mr. Brainerd eloquently adds: "Was Dean Swift wrong when he said, 'informers are a detestable race of people'? Did Wilberforce—statesman as he was—surrender his temperate, gentle and charitable nature when he said that the practice of employing spies and informers 'was as injurious to the best interests of the country and the constitution as it was repugnant to every principle of morality and religion': Had the equable and humane spirit which characterized the whole life of Sir Samuel Romilly for once abandoned this unrivaled legislator when, while declining to say 'whether there may or may not possibly exist cases in which private treachery may be encouraged for the sake of discovering public guilt,' he desired to diminish the employment of spies and informers, for the purpose of removing 'a plague from the bosoms of the peaceful and well disposed inhabitants,' * * * 'and as an agreeable service to the God of truth'? Vide Romilly's Speeches, vol 2. pp. 307–309. Are the merchants who appear here, making a request, which is meekness itself when compared with these expressions, fitly characterized, as they have been by the special agent, as 'infernal thieves, and their representatives'? I think not."

To our mind the vital objection to the system of informers may be stated in a few words: The truth never injures an honest man. It is his shield—his *tutissimum refugium*. The more it is told concerning him, the brighter he shines in the estimation of honest men. It is only dishonest men who deal in falsehood and love darkness and mystery. If, therefore, informers told only the truth, the cry against them would come from the dishonest alone; and it is not to shield the dishonest that penal laws are instituted. But, unfortunately, informers do not always tell the truth; but on the other hand,

there is too much reason to believe that, under the stimulus of the prospective rewards which constitute their incentive to exertion, they habitually pervert the truth, and act corruptly and oppressively. In illustrating his position, Mr. Brainerd has, as above shown, quoted from several writers familiar with the workings of the system in the British Empire. We are tempted to illustrate ours by another quotation, showing how the system worked in that great fabric of civilization on which have been reared the present states of Europe. It is thus stated by Gibbon, in describing the condition of the Roman Empire at the time of Constantine:

> Two or three hundred *agents* or messengers were employed under the jurisdiction of the master of the offices, to announce the names of the annual consuls, and the edicts or victories of the emperors. They insensibly assumed the license of reporting whatever they could observe of the conduct either of magistrates or of private citizens; and were soon considered as the eyes of the monarch and the scourge of the people. Under the warm influence of a feeble reign, they multiplied to the incredible number of ten thousand, disdained the mild though frequent admonitions of the laws, and exercised in the profitable management of the posts, a rapacious and insolent oppression. These official spies, who regularly corresponded with the palace, were encouraged, by favor and reward, anxiously to watch the progress of every treasonable design, from the faint and latent symptoms of a disaffection, to the actual preparation of an open revolt. Their careless and criminal violation of truth and justice was covered by the consecrated mask of zeal; and they might securely aim their poisoned arrows at the breast, either of the guilty or the innocent, who had provoked their resentment, or refused to purchase their silence. A faithful subject of Syria, perhaps, or of Britain, was exposed to the danger, or at least to the dread, of being dragged in chains to the court of Milan or of Constantinople, to defend his life and fortune against the malicious charges of these privileged informers. The ordinary administration was conducted by those methods which extreme necessity can alone palliate; and the defects of evidence were diligently supplied by the use of torture.

Bankrupt Act—Number and Value of Creditors.

Most of the questions which, so far, appear to have arisen under the amendments of June 22, 1874, to the bankrupt act, relate to the number of petitioning creditors, and the proportion of the total indebtedness of the alleged bankrupt, represented by them, in compulsory cases. Most of these decisions are decisions of district judges, and are hence without authority outside the district in which they were rendered; but, nevertheless, by collecting and presenting, as we shall endeavor to do in this note, a brief synopsis of them, some little assistance may be rendered toward making the administration of the bankrupt law "uniform" "throughout the United States."

Section 39 of the bankrupt act, as amended by § 12 of the act of June 22, 1874, contains the following language: "And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court, forthwith, a full list of his creditors, with their places of residence, and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs."

It has been held that this provision applies to all cases commenced since December 1, 1873, in which at the time of the passage of this amendment (June 22, 1874), the petitions for adjudication remained to be acted upon, but it does not disturb judgments rendered or adjudications in force prior to the date of its taking effect. *Re* Obear and *Re* Thomas, 1 Central Law Journal, 362, Dillon, J.; s. c., 10 N. B. R. 153; *Re* Angell, 1 Central Law Journal, 363, Longyear, J.; s. c., 6 Chicago Legal News, 341; 10, N. B. R., 73; *Re* Raffauf, 6 Chicago Legal News, 341, Hopkins J.; s. c., 10 N. B. R. 69; s. c., *sub nom.* Raffaux, 1 Central Law Journal, 364, note; *Re* Rosenthal, 1 Central Law Journal, 364, Krekel, J.; s. c., 6 Chicago Legal News, 342; 10 N. B. R., 191; *Re* Pickering, 10 N. B. R. 208, Withey, J.; Barnett v. Hightower, 10 N. B. R 157, Hill, J.; *Re* Comstock, 6 Chicago Legal News, 413, Deady, J. Some of these cases go so far as to assert that it would have been beyond the power of congress to pass an act which should have the effect to disturb adjudications already made. *Re* Comstock, *supra*; *Re* Angell, *supra*; *Re* Raffauf, *supra*; *Re* Pickering, *supra*.

Before any of these decisions had been published, it was held by Mr. District Judge Blodgett, in *Re* Scammon, that in cases pending at the time when the act of 1874 took effect, the petitions must be amended so as to show that creditors of the requisite number and value have joined therein; but the question of the effect of the act upon prior adjudications was not considered. 1 Central Law Journal, 328; s. c., 10 N. B. R. 166. The same ruling was made by Mr. District Judge Blatchford in *Re* Scull, 1 Central Law Journal, 399; s. c., 10 Albany Law Journal, 214; 10 N. B. R. 165. But in this last case there had been no adjudication at the time of the passage of the act of 1874, although the petition had been filed before that time. In *Re* Joliet Iron and Steel Company, 10 N. B. R. 60; s. c., *sub nom. Re* Scammon, 6 Chicago Legal News, 328, Mr. District Judge Blodgett rules that in all petitions pending in involutary bankruptcy, commenced since December 1, 1873, where no adjudication had been had, the petitioner must file a sworn amendment to his petition alleging that the petitioners represent one-fourth in number and one-third in amount of the creditors of the bankrupt. Both in this case and in *Re* Scammon, the leaned judge holds that it is unnecessary that this allegation should be positive; it may be upon information and belief. In *Re* Hill, 10 N. B. R. 133, a petition in involuntary bankruptcy was filed since December 1, 1873, and on March 18, 1874, a memorandum was made by Blatchford, J., on the papers signed with his initials, "let an order, for adjudication be entered," but no action was taken by counsel on either side to have the order entered until after the 22d of June, 1874. *Held*, that an adjudication

had not been made, and that such an order could not be entered unless the petition was made to conform to the requirements of the new law. A rule established by Mr. District Judge Hill, after fully considering this question in Barnett v. Hightower, *supra*, provides that all involuntary cases commenced before December 1, 1873, and not adjudicated on the 22d of June, 1874, may proceed as though the petition were amended so as to conform to the provisions of the above section, *unless objection is made by the defendant.* 10 N. B. R. 164; s. c., 1 Central Law Journal, 384. A contrary view was taken by Mr. District Judge Longyear, in *Re* Buchanan, 1 Central Law Journal, 456. And in *Re* Keeler, 10 N. B. R. 419, it was held by Mr. District Judge Blatchford, that the absence of the proper allegation as to the number and amount of petitioning creditors is not supplied by an admission in writing that the requisite number and amount have joined in the petition. Such an admission to be noticed by the court must be in writing; must be signed by the debtor, and his signature must be duly authenticated, and it must be verified by oath. Even then the court must be satisfied that the admission was made in good faith before it can adjudge that the requisite number and amount have petitioned. *Ibid.*

In *Re* Burch, 10 N. B. R. 150, it was ruled by Mr. District Judge Withey, that a *prima facie* case must be made by the petition as to the number and value of creditors, this being a material and substantial fact, before the court can acquire jurisdiction to grant an order to show cause. Therefore, when a petition was filed on the 25th day of June, 1874, three days after the amendatory act of 1874 took effect, and the petitioning creditor was at the time ignorant of the passage thereof, this ignorance did not excuse his failure to comply with the above requirement, and his petition was held not amendable, but was dismissed. But see *Re* Simmons, 1 Central Law Journal, 440, Longyear, J.; s. c., 10 N. B. R. 253; and *Re* Williams and McPheeters, 7 Chicago Legal New, 49, Woodruff, Circuit J.

If the debtor denies that the requisite number and value of creditors have joined in the petition, his denial must be verified. *Re* Stienman, 6 Chicago Legal News, 338, Blodgett, J.; *Re* Hymes, 10 N. B. R. 433, Blatchford, J. The list of his creditors filed by the debtor should be verified in like manner, by the oath of the debtor. *Ibid.* In this case, by a comparison of the list of creditors filed by the debtor, with the list of petitioning creditors, it appeared that the provable debts due the creditors who had petitioned, did not equal one-third of the aggregate provable debts due to such of the creditors of the debtor as held provable debts exceeding the sum of two hundred and fifty dollars, and a reference was made to the clerk to determine the issue. *Ibid.* The affirmative of such an issue is on the petitioning creditors. *Ibid.* The debtor must attend at the hearing before the clerk in such a case, and submit to an examination as to all matters pertinent to the issue. *Ibid.* The clerk must, in such a case, send written or printed notices by mail, postage pre-paid, to all of the creditors named in the list, at the addresses given in the list, of the time and place of reference, and its object, at least ten days before the hearing; such notice to contain a copy of the list, with names, places of residence and amounts. *Ibid.*

Where petitions were filed against an alleged debtor since December 1, 1873, and the debtor had made a denial, and had demanded a jury trial, and had since filed a demurrer, he was required to file a list of his creditors and the amount of their claims. Warren Savings Bank v. Palmer, 6 Chicago Legal News, 366, McCandless, J.; s. c., 10 N. B. R. 239. But in *Re* Scammon, 7 Chicago Legal News, 42, Mr. District Judge Blodgett holds, that if it appears that the requisite number and amount of creditors have not joined in the petition, the court will dismiss upon motion without requiring the debtor to file a schedule. "It would be intolerable," said the learned judge, "if any one or two creditors, upon either a real or pretended claim, could by a single allegation, in the words of the amendment, compel a business man to spread upon the records a statement of his liabilities. Such a fishing petition cannot be entertained under the act as amended." We cannot altogether concur in this sentiment. We cannot conceive what principle of public policy is subserved by shielding an insolvent debtor in concealing from those who have given him credit, and confided in him the true state of his liabilities. From the fact that one man has asked and received credit of another, the law ought to imply a promise on his part to render to his creditor a fair, open and truthful account of his condition when required, and nothing less than this can satisfy that honesty and good faith which should always subsist between debtor and creditor. Of course, if such a petition is a mere "fishing" petition, designed to trifle with the time and process of the court, it ought to be rejected, and its authors punished for a contempt. But, nevertheless, the truth wrongs no man. None but the dishonest man of business—he who has dealt fraudulently or designs to deal fraudulently with his creditors—can be interested in concealing from them the true state of his liabilities. The law—or at least equity—loves the truth, courts the light, and despises concealment as the companion of fraud; and while a court of justice should not permit itself to be trifled with, it can have no interest in keeping creditors in the dark as to the condition of their insolvent debtor.

In the same case it was also held that the court would hear affidavits and evidence offered by either party, and would order the person verifying the petition to be examined before the register.

After the requisite number of creditors have joined in the petition, a portion of them will not be permitted to withdraw so as to break the quorum; but it seems that the proceedings may be dismissed, if all join in the application. *Re* Heffron, 6 Chicago Legal News, 358; s. c., 10 N. B. R. 213.

The same section of the bankrupt act as amended, provides that "the petition of creditors under this section may be sufficiently verified by the oath of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath, or oaths of the attorney or attorneys, agent or agents, of such signers."

Under this provision it has been held, that where there are less than five signers to the petition, and it is verified by an *agent*, it is not necessary for such agent to state the *residence* of his principals as the foundation of his right to act in the premises. *Re* Simmons, 1 Central Law Journal, 440, Longyear, J.; s. c., 10 N. B. R. 253. Where several petitioners join in the petition in separate and distinct rights, each stands as a separate and distinct party to the litigation, so far as the right in which he prosecutes is concerned. It follows that a

verification by or on behalf of each petitioner is required. *Ibid.* When a petition is filed, the court so far acquire jurisdiction, notwithstanding the insufficincy of the verification, that it may allow it to be amended. *Ibid.*

The same section as amended also contains the following language: "And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars, shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars, fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

An interesting exposition of this provision by Mr. District Judge Blatchford, will be found in *Re* Hymes, 10 N. B. R. 433. The views of the learned judge may be condensed as follows: In determining whether the requisite proportion of petitioning creditors have joined in the petition, such creditors only should be reckoned whose provable debts exceed two hundred and fifty dollars. And if the petitioning creditors whose provable debts exceed the sum aforesaid, constitute one-fourth in number of the creditors holding provable debts exceeding said sum, the requirment as to the number of petitioning creditors is satisfied. So where the petition is filed on behalf of creditors holding provable debts exceeding the sum of two hundred and fifty dollars, in order to ascertain whether the amount of the provable debts held by them is equal to one-third in amount, only the provable debts of creditors which exceed two hundred and fifty dollars must be reckoned. And the requirement of the statute is satisfied if the provable debts due to such petitioning creditors equals one-third of the provable debts due to creditors holding provable debts exceeding the sum of two hundred and fifty dollars. And it is not necessary that the amount of the provable debts of the petitioning creditors should be equal to one third of *all* the provable debts. The true construction of the above proviso, that "if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding said sum fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid," requires that when creditors having debts of a less amount than two hundred and fifty dollars are reckoned at all, they must be reckoned for all purposes, and in such case the petitioners must constitute one-fourth in number of *all* creditors, and the amount of their provable debts must be equal to one-third of *all* the provable debts.

In *Re* Frost, 7 Chicago Legal News, 42, it is ruled by Mr. District Judge Blodgett, that only those creditors are to be counted whose debts are unconditionally provable. Those claiming liens or holding security cannot be reckoned.

—A SUIT has recently been tried in the United States District Court for the Eastern District of Philadelphia, before Mr. Circuit Judge McKennan, in which a check for $100 had been raised by the drawee to $2,100, and paid by the bank; the action being by the drawer of the check to recover of the bank the $2,000 improperly paid. Judge McKennan is reported to have charged the jury that if they believed, from the testimony and from an inspection of the check, that there was nothing unusual in its appearance, nothing which would have been sufficient to put a careful person upon his guard, then they should find for the defendants; if otherwise, their verdict should be for the plaintiffs. The paying tellers of several banks having testified that there was nothing in the appearance of the check, as raised, to excite suspicion, the jury rendered a verdict for the bank.

Federal Court Jurisdiction—Union Pacific Railroad Company.

UNITED STATES, ON RELATION OF HALL *et al.* v. UNION PACIFIC RAILROAD COMPANY.

[S. C., *ante*, 288.]

United States Circuit Court, District of Iowa, October Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge,
and " JOHN LOVE, District Judge.

1. **Union Pacific Railroad—Jurisdiction—Mandamus—Service of Process.**—The Circuit Court of the United States for the District of Iowa, under the acts of Congress relating to the Union Pacific Railroad Company, has jurisdiction in *mandamus* to compel that company to operate its road as required by law, if any part of the road is in the district of Iowa; and under the act of June 20, 1874, service of process may be made upon the president or general superintendent of the company, found in the district of Iowa.

The alternative writ of mandamus awarded at the last term was served upon the president and general superintendent of the company at Council Bluffs, in this district..

The marshal's return on alternative writ of mandamus is as follows:

"This writ came into my hands on the 10th day of June, A. D., 1874, and on the same day I served the same on Sidney Dillon, president of the within-named defendant, the Union Pacific Railroad Company, at the transfer grounds of said company, in the city of Council Bluffs, county of Pottawattamie, Iowa, by delivering to him a true copy thereof, and offering to read to him the within writ, which he then and there waived, and on the same day I served the within writ on S. H. H. Clark, general superintendent of the within named defendant, the Union Pacific Railroad Company, by delivering to him a true copy thereof, and offering to read the original, which he then and there waived; all done at the transfer grounds of said Union Pacific Railroad Company, in the city of Council Bluffs, Pottawattamie county, Iowa."

The company made a special appearance, and excepted to the sufficiency of this service, and moved to quash the same.

In support of the motion, the following affidavit was filed:

A. J. Poppleton, being duly sworn, says, that for several years, last past he has been, and now is, the attorney of the Union Pacific Railroad Company, defendant in this action. That said corporation is created by, and organized under, a law of the United States; that, by a certain joint resolution of Congress, passed and approved April 10th, 1869, the stockholders of said company were authorized to establish their general office at such place as they might select at a meeting to be held in the city of Boston, April 22, 1869; that at such meeting said city of Boston was by said stockholders selected, and its general offices established in said city, where it has ever since remained. That in said city, in the state of Massachusetts, all the meetings of its board of directors are held, and its books and records kept, and that all its officers are residents of said city, except its president, who resides in the state of New York; that it has no other office or place where its legislative corporate power is exercised; that its managing office, where the power and authority of its managing agents, to-wit: Superintendent, auditor, cashier, general freight and ticket agents is exercised, is wielded, is in the city of Omaha and state of Nebraska, and it has no general managing office elsewhere; that the alleged service of the writ in this action was made on Sidney Dillon, president of said company, while casually traveling through the district of Iowa, he being at the same time a resident of the city and state of New York, and that defendant has and owns no railroad situated in the state of Iowa, except such portion of the iron track laid over and across its Missouri River Bridge and the approaches thereto as are East of the boundary line, between the states of Iowa and Nebraska.

That said S. H. H. Clark, general superintendent, upon whom

said alleged service was also made, resides, and has his office at Omaha, Nebraska, and that neither the said Dillon, president, nor Clark, superintendent, neither reside or have an office in the state of Iowa.

A. J. POPPLETON.

Subscribed and sown to by A. J. Poppleton, before me, October 13th, 1874. GEORGE B. CORKWILL, Clerk.

John N. Rogers, for relators; *J. M. Woolworth*, and *A. J. Poppleton*, for R. R. Co.

DILLON, Circuit Judge, on overruling these exceptions, in orally delivering the judgment of the court, in substance said:

This is a proceeding instituted by certain persons residing in Council Bluffs, in this state, who claim that they are aggrieved by reason of an alleged failure of the Union Pacific Railroad Company to operate its road according to law.

The 15th section of the act of 1864, which was an act amending the original charter of this company—giving it additional subsidies and additional grants of land—by means of which in reality the road was subsequently constructed, provided that it should be the duty of the company to operate its road, so far as the government and the public were cencerned, as one continuous line.

In this case it is alleged that the company refuses to operate their road as a continuous line; that in fact they operate it as one continuous line as far only as the city of Omaha, and there break its continuity by the agency of a distinct and separate transfer from that point to the Iowa side. This is the complaint which the relators make, and which they allege to be in violation of the terms of the charter of the company and its duty to the public. 2 Dillon Cir. Court Rep., 527.

In 1873 Congress passed an act in these words: "The proper Circuit Court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the said Union Pacific Railroad Company to operate its road as required by law." This was an act which was indispensable in order to give the federal court original jurisdiction in mandamus, and was passed for that purpose. 2 Dillon, 527. This proceeding heretofore came before us on two questions. The one was, "Whether private persons could move for the writ; that is, could institute these proceedings to compel the road to perform its public duty, or whether the proceeding must not be instituted by the attorney-general." We have decided at the last term, that the writ was well moved; that if private persons could show that they were interested in the operation of the road, they had a right to come into court under this act and call the company to account for failing to perform its public duty, to their injury, and thereupon award the alternative writ.

On the other question, whether the Circuit Court of the District of Iowa was the "*proper* circuit court" before which to bring this proceeding, we gave no opinion. The act of June, 1874, makes an addition to the 15th section of the act of July, 1864, and provides that there shall be added to it the following words: "Any officer or agent of the company who is authorized to construct the aforesaid road, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph lines under his control or which he is engaged in operating, for purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line, and without discrimination of any kind, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined and imprisoned.

This act makes it the personal duty of the officers of the road to operate it as one continuous line. Now, if it can be shown that the president of the road is not operating it as a continuous line, within the meaning of this act of Congress, then he is guilty and may be punished, and we do not think for the violation of the act in this respect he can be protected by any resolution of the board of directors. The law says: "You shall operate this road on one continuous line," and enjoins this duty upon the officers of the road. In the next sentence the phraseology changes: In case of failure or refusal of the Union Pacific railroad, or either of said branches to comply with the requirements of this act, and the act to which this is amendatory, an action against them may be brought in the District or Circuit Court of the United States, in the territory, district or circuit in which the road or any portion of it may be situated, for damages on account of such failure or refusal. The action must be brought in the court of some district in which some portion of the road of the defendants is situated.

Now, in this proceeding, it is alleged that a portion of the road which this company refuses to operate as one continuous line, is situated within the geographical limits of the state of Iowa. On this motion we must take this to be true. The act of 1874 provides, that if process in any suit is served upon any agent of the defendant found within the territory, district, or circuit in which such suit may be brought, such service shall be held by the court to be good and sufficient. In this case the alternative writ of mandamus was served upon the president and the general superinpendent of the company at Council Bluffs, in this state, and the question is, whether this is a sufficient service to give this court jurisdiction, assuming that some portion of the road of the defendant is in this district, and assuming that the road is not operated as required by law. It is of course to be regretted that the phraseology of the act is not so clear as to admit of no controversy; and yet, when we consider that it is our duty to carry out the intention of Congress, so far as we can learn it, it does seem to us that it admits of very little doubt that this is, upon the assumptions above mentioned, a proper circuit court.

The writ of mandamus may go to the corporation, to the corporate body and command it to perform its duty (granting that any part of the road is in this district), and if this writ, thus commanding this duty, is served upon the chief officer of the corporation, its president, or upon any officer who may be indicted and criminally punished, if he fails to do his duty in this respect, then it seems to us the court has jurisdiction over the company and its officers, by mandamus, to compel the performance of this duty. This writ may, perhaps, run also under the act of 1874, to the president of the company:—"You are hereby commanded to operate the road as one continuous line."

Under this act, this is a duty which he can and should perform. He can be criminally punished if he does not perform it, and it is no protection to him that the board of directors has ordered him to do something else. The writ of mandamus may be served upon him, and he is obliged to respond to it, whether it be regarded as a proceeding against him as an officer, or whether it be regarded as against the corporation.

The argument is this: The act of 1874 enjoins the duty to operate the road as one continuous line, upon the officers engaged in operating the road; if they refuse to do so they are made indictable.

The duty to be performed by them is one which rests upon the officers as well as the corporation; otherwise Congress would not have made it criminal for the officers to refuse to discharge it. It is their duty to obey the law; if they fail they may be proceeded against criminally, and the public duty may be enforced by mandamus, and this writ may be directed to the corporation and served as required by the act of June 20, 1874, or perhaps to the president or officers who are made subject to indictment under that act, and served upon them if found within the district. Whether any portion of the road of the company is within this district, and whether the transfer between Omaha and Council Bluffs, by means of the "Omaha Bridge Transfer," which is the subject of the relators' complaint, is in violation of the duty of the company or its officers, as enjoined by law, are questions which are not passed upon on the present motion.

And again, considering that the original charter of the company, as well as the act of March 3, 1873, provided no mode of service,

and that the act of 1874 was designed to enforce the duty enjoined by the 15th section of the act of 1864, all these acts are to be construed as *in pari materia*, and thus regarded, any proceeding or suit to enforce the duty enjoined by the 15th section, may be instituted in the proper court, and the proper court, as prescribed by the act of 1874, is one in the district in which some part of the company's road is situated, and in any such proceeding or suit the process may be served upon the company's agents found in the district; and in this proceeding by mandamus, our judgment is, that service of the writ upon the president or any officer whose duty it is to see that the road is operated as required by law, is sufficient. Exceptions to service of alternative writ overruled.

LOVE, J., Concurred.

Negligence by Carriers—Loss of Goods by Flood.

VAUGHN v. NASHVILLE AND CHATTANOOGA RAILROAD COMPANY.

Supreme Court of Tennessee, Knoxville, September 26, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" THOS. J. FREEMAN,
" JOHN L. T. SNEED,

In an action against a railway company for damages for the non-delivery of goods entrusted to it as a carrier, where the defence is that the damage occurred through an extraordinary and unprecedented flood, it is competent to prove, that at the time and place of the flood, a portion of the track of *another* railway company near by, was unoccupied and not overflowed, and that the defendants' cars could have been transferred to said track, but that the use of said track was not tendered to the defendants by the company owning it, nor was its use requested by the defendants. If the transfer to the other track was fairly within their power in the use of such diligence, consistent with the surrounding circumstances and duties, and the same could have been obtained without trespassing on the rights of the other company, but by their consent, then it would have been the duty of the defendants to have so moved the car in which the goods in question were, and thus saved them from damage. And whether this could have been done was a question of fact for the jury.

FREEMAN, J., delivered the opinion of the court.

The plaintiff alleges the delivery of nineteen hundred yards of linen to the defendant, as common carrier, to be safely carried from Chattanooga, Tennessee, to Louisville, Ky., and then delivered by the defendant to L. G. Henry & Co., on account of plaintiff, and avers a failure so to deliver, and damages as a consequence to the amount of two thousand dollars. The defendant pleaded not guilty, and gave notice that on the trial of the cause it would insist in defence, that the grievance complained of resulted from an extraordinary rise in the Tennessee river.

The first question presented and urged by the defendants for reversal of the judgment, is the admission of testimony of one Ragsdale, the agent of the East T. & Georgia R. R. Company, to the effect that cars could be transferred from defendant's road to aid East Tennessee & Georgia road, by means of the track and switches, and that there was a portion of the track of said last road, that was not overflowed, near by, within the corporation of Chattanooga. He proved further, that a portion of this high track was not occupied at the time of the unprecedented flood which caused the damage complained of, but that said track was not tendered to the defendant, nor was its use requested by them. It is insisted this was within the principle of the case of David, decided at the September term, 1872, of this court. In that case it was held not error to exclude testimony showing that prudent business men in Chattanooga, upon the same height of ground as the railroad, lost goods by the flood. In other words, that the fact that other men lost goods, had no proper tendency to prove, or disprove, the question involved in the case, as to whether the defendants "had used the precaution and vigilance which the law imposed on them under the circumstances." This ruling was unquestionably correct, but we do not think the questions presented are the same. In this case the effort was not to show that others lost or saved their goods in Chattanooga by the flood, but to show that the defendants, by the precaution of moving the threatened car on to another road, conveniently situated, might have saved the goods from damage by the flood. The question is whether, in this view of the case, the evidence was admissible, and whether, if such was the fact, it was the duty of the company to so remove the car. It is insisted by defendant, that no such duty was imposed; that this would have been to require an extraordinary amount of diligence on the part of the railroad, not imposed by law.

The case of Empire Transportation Co. v. Wallace, 68 Penn. St. 302, is cited in support of this view of the case. The rule is there correctly laid down by Judge Sharswood, in reference to the duty of the carrier to transport the goods by the usual route, and within a reasonable time, when no time is specified in the contract. He adds: "He must use reasonable expedition, but is not bound to extraordinary exertions, or to incur expenses in order to surmount obstacles not caused by his own default, but by the weather or other act of Providence. Redf. on Carriers, 210, 220. This was an action for failure to carry oil shipped from Pennsylvania to Boston, by way of Philadelphia. The usual route was by water from the latter place, and defendants had the option to ship by rail or water; water communication was prevented, for the time, by ice, and it was insisted that defendants should have incurred, what at the time would have been an extraordinary expense, and shipped the oil by rail. The court held, under the above rule, that the company was not bound to ship by rail, as the court below had ruled. This ruling was correct, but that case is not the same as the one now under consideration. The question here is, whether, when the article shipped and agreed to be carried was suddenly exposed to an extraordinary peril, it was not reasonable diligence to remove it from that peril by transferring it to the convenient road above overflow, not for the purpose of transporting it to its destination by that route, but for its preservation from damage or destruction while in its possession We think the sound rule is, that if by the use of such active diligence, and of such means as would be suggested to, and within the knowledge and capacity of well informed and competent business men in such position, the article could have been saved, it was their duty to have used such means. If the transfer to the other track was fairly within their power, in the use of such diligence, consistent with the surrounding circumstances and duties, and the same could have been obtained without trespassing on the rights of the other company, but by their consent, then it would have been the duty of defendants to have so moved the car, and thus saved it from damage. This would have been a question of fact for the jury, under the instructions of the court. In this view of the case, we cannot say the facts shown were not competent to go to the jury on the question, whether the defendant had used reasonable efforts, under the circumstances, to preserve the goods from injury. This must be so, unless we hold, that the defendant could not be required to remove the goods from their own track or cars temporarily, but might keep them there, although threatened with destruction, when such removal could, by reasonable efforts and energy, have been effected, and this simply because, by their contract, they were only bound to transport, by the usual route, to the place of destination. We do not think such a rule can be fairly sustained, either on sound principle or authority. See Redfield on Carriers, Sec. 237, 304, 358.

In reference to several points of objection made in argument, and authorities referred to, we need but say, that any delay in the transportation of the goods, would clearly, on principle and authority, be excused and not create liability on the part of the company, when such delay was the result of providential causes, such as the freezing of the river, in the case from Pennsylvania, or loss of the company's bridges, in case referred to by Mr. Redfield. Sec. 304, 305. So the freshet in this case, and the falling of a rock on the road from Lookout Mountain, would have excused any delay occasioned

by these causes. But then it was the duty of the company, as soon as might be after removal of the obstructions, to proceed in performance of their contract. This action is brought for failure to carry safely and deliver at all, as by the terms of their receipt they were bound to do. See Hadley v. Clarke, 8 Term Reports, 259; cited, Redfield on Carriers, Note 1, to p. 221. The temporary obstruction does not avoid the contract—only suspends the execution of it. Angell on Carriers, § 289.

Without examining in detail all the questions suggested in argument, after a critical examination of the charge of his honor, we think it laid down the rules of law, applicable to the questions involved, correctly. As to whether the evidence sustains the verdict, we have but to say, that the question was fairly submitted to the jury on the facts, and we see no cause to disturb it.

AFFIRM THE JUDGMENT.

Remedy in State Court against National Bank to Recover Penalty for taking Usurious Interest.

E. STEADMAN *et al.* v. E. F. REDFIELD & CO. AND THE FIRST NATIONAL BANK OF CHATTANOOGA.

Supreme Court of Tennessee, Knoxville, September Term, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED,
" THOMAS J. FREEMAN,

The act of Congress creating a system of national banks, fixes the rate of interest to be charged by the banks, and prescribes a penalty and a remedy for its recovery; and the Tennessee code, section 1995, provides, that where usury has been charged, a creditor of the party paying it may recover it back. The complainant alleges that the defendant—the bank—charged its co-defendant usury, and sought to recover under the code, as a creditor of the party paying the usury, the amount usuriously received. The court hold that the penalty and remedy prescribed by the act of Congress is not the exclusive remedy against a national bank in such case, and that a creditor is not thereby precluded from sueing the bank for usury received of a debtor, under the state laws.

MCFARLAND, J., delivered the opinion of the court.

This bill was filed under section 1955 of our code—the complainants alleging that they are judgment creditors of the defendants, E. F. Redfield & Co., and that in transaction with the First National Bank of Chattanooga, the bank had received from Redfield & Co. an amount of usury for the loan of money sufficient to pay complainants' judgments, and complainants seek by this bill to recover the same from the bank. Defence was first made by demurrer, which was overruled, and then by plea, which was held sufficient, and the bill dismissed. The defence is this: that the bank was organized under the acts of Congress establishing the system of national banks; that the act fixes the rate of interest to be charged by the bank to be the rate fixed by the laws of the state where the bank is situated, and the act of Congress further prescribes certain penalties and forfeitures for taking a greater rate of interest than is thus allowed to be charged, and among these penalties the right of a creditor of the borrower to sue and recover back the usury is not included. And it is maintained that this penalty and remedy is exclusive of all others, and that none other can be allowed.

The penalty prescribed by the act of Congress is double the amount of interest paid, to be recovered back by the person paying the same, or his legal representative, if sued for in two years.

The remedy given by our code, sec. 1955, is to recover back the *usury* paid, and this remedy is also given to a judgment creditor of the party paying it. The principle contended for, that when a penalty is prescribed by statute, and the remedy for its recovery is also given, that the penalty cannot be recovered in any other mode, is no doubt correct; and from this we may conclude, that the penalty prescribed in the act of Congress cannot be recovered by a creditor of the party paying the usury, as the remedy prescribed by the the act is only given to the party paying, or his legal representative.

It will be observed, however, that this bill does not seek to recover this penalty. The penalty fixed by the act of Congress is double the amount of the entire *interest* paid; this is in the nature of a fine, or punishment for the violation of the law, for it allows the party to recover more than he would otherwise be entitled to. This bill only seeks to recover back the usury, that is, the excess over the lawful interest. There is in this nothing in the nature of a penalty—it simply requires the bank to pay back the money to which it is not lawfully entitled, leaving it to retain all lawful interest.

To compel the party to do simple justice, has nothing in it in the nature of punishment. This recovery is allowed by the laws of the state, if they are applicable.

It may be conceded that where Congress has rightfully legislated upon a subject, a state legislature has no power to legislate in conflict therewith; and that the legislature of the state has no power to pass laws with special reference to national banks, upon the matters embraced in the acts of Congress. But it seems manifest "that a national bank must, in other respects, be subject to the general laws of the state where it is located; that their contracts are governed and construed by the state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state laws." Such is, in substance, the language of Justice Miller, delivering the opinion of the court, in The Bank v. Commonweath, 9 Wallace, 353.

As already said, the recovery here sought is no part of the punishment prescribed by the laws of our state. Our law makes *usury* indictable as a misdemeanor. Whether the penalty prescribed by the act of Congress in question would preclude an indictment under our state laws for the same offence, is a question not involved here. There is a class of cases where it has been held, that the same act constituted an offence against both governments, and is punishable by both. But we need not enter into a discussion of this subject; nor need we discuss what would be the effect of a recovery in a case of this character upon the right to enforce the penalty prescribed by the act of Congress. Ordinarily, a party guilty of usury could not escape punishment by refunding the usury, and so, we suppose, if he were compelled by law to refund it, the question of his punishment for the offence would not be thereby affected. Nor need we discuss what would be the effect upon the right of a creditor to recover, in a case of this character, if it should appear that the penalty prescribed by the act of Congress had been received; this is not averred, nor does it appear that the bank is now liable for the penalty, as the limitation of two years has probably elapsed.

We have not found, in the authorities furnished us, any satisfactory discussion of this question. While the language of some of the judges, in some of the cases, seems to bear upon the question, yet their language has reference to a different state of facts, and really different questions, and therefore they should not be regarded as deciding this question.

We are of the opinion that the act of Congress prescribing a penalty as a punishment for violating the law, was not intended to preclude the state courts from compelling the usurer to do simple justice, according to its own laws, by restoring the usury to the party from whom it was received, or his creditor, especially where it does not appear that the penalty has been enforced, or is now subject to be enforced. In this view, the plea was insufficient. The decree will be reversed, and the plea held insufficent. The cause is remanded for an answer, the bank paying the costs of this court. REVERSED AND REMANDED.

—[*Nashville Com. Reporter.*

Replevin for Promissory Note—Effect of Judgment—Res Judicata.

CHARLES B. WAITE v. J. D. TRIBLECOCK.

United States Circuit Court, District of Iowa, May Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge,
and " JOHN LOVE, District Judge.

Judgment in an undefended action of replevin for a note in favor of the maker, which action was brought upon the ground that the note had been obtained by fraud, and in which only the banker having the note for the collection of interest thereon was made a defendant, was, held under the circumstances, not to bar the owner of the note (an indorsee thereof for value before maturity) from maintaining an action thereon against the maker.

The defendant gave his negotiable note, secured by mortgage, for 20 per cent. of stock subscribed in the Great Western Insurance Company of Chicago; that being the *cash* payment required by the company. This note and mortgage were sold and assigned by the company to the complainant, a citizen of Illinois, before due, and as the court decided, for value. The note was sent by the complainant to one Ellis, a banker in Iowa, for collection of interest. While in the possession of the banker for that purpose, the defendant brought an action of *replevin* in the state court against the banker as defendant, for the note, and on the writ of replevin, obtained possession thereof. The ground of the replevin action was, that as the note had been obtained by fraud, the makers were entitled to its possession.

The present complainant did not appear to the replevin action, nor was he made, nor did he make, himself a party to it. Judgment was given in the replevin action for the plaintiffs therein. In the present bill to foreclose the mortgage, the defendant pleaded specially the judgment on the replevin action as a conclusive bar to the complainant's right to foreclose the mortgage.

Clark and *Harbert*, for the complainant; *H. H. Trimble*, for the defendant.

DILLON, Circuit Judge, in disposing of this question, said orally, in substance:

The special defence, that the plaintiff is concluded by the judgment in replevin in the state court, is not well founded in law.

The pleadings in that case go upon the idea that the Great Western Insurance Company was the owner of the notes, and that the defendant therein, Ellis, was the agent of the company. The findings in the judgment of the state court as to Waite, the present complainant, are outside of the issues and void. Waite was the owner of the note, and the indorsement on the note so disclosed, and if he was to be bound, should have been made a party to the replevin action. Besides, his claim of ownership to the notes was known to the plaintiff in replevin long before the cause was tried, and they refused to make Waite a party.

Ellis was in the interest of the plaintiffs in that suit, and no defence in fact was made, and there was no trial on the merits as respects Waite, the real owner. Jones was employed as an attorney in the replevin suit by the insurance company, and not by Waite.

Whether the validity of the note could have been tried in an action of replevin in the manner sought, had the real owner been a party, need not be decided. The action of replevin is not one *in rem*, and to give jurisdiction over the person, he must be a party. Ellis sustained no such relation to the note or to Waite as to make the judgment against him which he did not defend for Waite, conclusive on him. It is *res inter alios acta* as to Waite.

LOVE, J., concurs.

—IN the case of United States v. Ryan, United States Circuit Court, District of Arkansas, the indictment in one of its courts, charges that Ryan, who was a revenue officer of the United States, took a bribe from F. A. Hobbs. On demurrer, Caldwell, J., held that this use of initial letters for given and middle names, did not make the indictment demurrable. This decision was in construction of the act of June 1st, 1872 (Stats. at Large for 1871-2, chap. 255, sec. 8), and will be the rule of practice in that court.

[Correspondence.]

Liability of Express Companies for Goods Lost in Railroad Accidents—Judge Ballard's Recent Decision.

EDITORS CENTRAL LAW JOURNAL:—The opinion of Judge Ballard in the case of the Bank of Kentucky v. Adams Express Company, delivered in the Circuit Court of the United States (District of Kentucky), is reviewed in your CENTRAL LAW JOURNAL, of October 1st, 1874, pp. 498-500. The importance of the question involved, renders it proper in the profession to subject the opinion to a re-examination of the principles and authorities upon which it relies. It has attracted much legal attention, and has provoked many comments, but none more suggestive than those of your correspondent in the review referred to.

Agreeing as I do with the decision, I will endeavor to point out what I conceive to be the misapprehension of the learned correspondent as to the principles announced by the court, and then to invoke authorities, which, though differing with those cited by the able reviewer, must convince him that he has read but one side of the question, and that he has overlooked those cases which are decisive in a federal court. Your correspondent, in his letter of October 1st, has not quoted the language of the court which he undertakes to criticise, but has inferred a statement of principles which is nowhere to be found in the opinion. I will quote from the review: "The bank sued for the money upon the theory that the fire occurred through the negligence of the defendant, or of some one else, whose negligence was imputed to the defendant, and claimed on the trial that the evidence showed negligence on the part of the railroad company, and that the defendant was liable to the the plaintiff for a loss occasioned by such negligence. But the court instructed the jury, that they should disregard the evidence on the question of negligence of the railroad company, holding that in such case the defendant is only responsible for the negligence of itself and its employees." To sustain this view of the case, the learned judge assumes, that the express company is but an "*ordinary bailee for hire*," is only bound to ordinary diligence of itself or its servants, and as the railroad company was not its servant, it was in no way responsible for the negligence of those who controlled the railroad and its carriages. The whole opinion is based upon these propositions, and is made up of illustrations based upon them. "Now the principle inferred here as underlying the opinion of the court is, that the express company '*is but an ordinary bailee for hire*,' and is only bound to ordinary diligence; whereas the court distinctly held in the very first instruction given, "that the Southern Express Company and the Adams Express are common carriers. What Judge Ballard decided is, that the Adams Express Company was a common carrier, and as such liable for the safety of the values intrusted to it for transportation; that it was not liable for the loss of this package of money, because this loss was caused by fire, and by the express contract it was not to be responsible for loss by fire. If a common carrier may, by express contract with the consignor, limit, modify, or reduce his common law liability, then the Adams Express Company had a right, by express contract, to limit its common law liability. If it be lawful for a common carrier to contract against his common law liability for loss by fire, then the Adams' Express Company had a right, by express contract, to limit its common law liability for loss by fire of this package. The express contract against the defendant's liability for loss by fire was made in this case, and it was a lawful contract, such as it is now everywhere admitted common carriers may make. Grace v. Adams, etc., 100 Mass. 505; Holford v. Adams, 2 Duer, 480; York Co. v. Ill. Central R. R., 3 Wallace 107. The position taken by Judge Ballard, therefore, is not the position assumed by your learned correspondent to have been taken. The principle decided by Judge Ballard is this: That a common carrier may, by express contract with the shipper, limit, modify or reduce his common law liability; that an express con-

tract against his common law liability for loss by fire is lawful, and when such a contract is made, and a loss by fire occurs, the common carrier is not liable under his common law liability as a common carrier, but is liable only as an ordinary bailee for hire. The Adams Express Company is a common carrier; it made an express contract with the shipper of this money, not to be liable for its loss by fire as a common carrier; this package was lost by fire, therefore this common carrier was, for the loss from this particular cause, not liable as a common carrier, but being a bailee for hire, it was liable as an ordinary bailee for hire would be. Let us try this position by principle and authority. The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident—in other words, the act of God or the public enemy. Suppose, therefore, a loss were to happen from the act of God or the public enemy. The common carrier being the bailee for hire in possession, would for that loss not be liable, unless his liability could be grounded on his duties as a bailee for hire; that is, on his duty not negligently to expose the goods to the overwhelming causes of destruction. The gist of the action in such a case would not be his common law contract of carrier, but his negligence as a bailee. When in the case supposed the carrier has shown the destruction of the goods by the act of God or the public enemy, it is not also necessary for him to show that he exercised great diligence, and that he was not negligent, but the burden of proof shifts to the shipper, and he must aver and show negligence, and there place the carrier's liability upon the ground upon which an ordinary bailee for hire would be liable. We have already seen that a common carrier may, by special agreement, restrict his common law liability. The law as it now stands, therefore, may be formulated thus: "A common carrier is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident, that is to say, the act of God or the public enemy, or from causes against the liability for which a special agreement has been made." If, therefore, a loss happened from the act of God or the public enemy, or from causes against the liability for which a special agreement has been made, the ground of recovery against the bailee is not the common law contract of the carrier's insurance, but the negligence of the bailee for hire, and when this is the ground it must be averred and proven by the owner. In New Jersey Steam Navigation Company v. Merchants' Bank, 6 Howard, 385, the recovery is distinctly placed upon the ground of "great want of care, and which amounts to gross negligence on the part of the respondent in the stowage of the cotton," and the principle here set forth perspicuously recognized. "The respondents having succeeded in restricting their liability as carriers, by the special agreement, the burden of proving that the loss was occasioned by the want of care, or by gross negligence, lies on the libellants, which would be otherwise in the absence of such restriction." Ibid. 384.

In Clark, etc. v. Barnwell *et al.*, libel for damages to 24 boxes of cotton thread, the supreme court, by Justice Nelson, say: "For as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular stipulations of the parties, offer an excuse for the nonperformance of the contract after the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading, and even where evidence has been thus given, bringing the particular loss and damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; further, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty."

Hence it is, that although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him, (12 Howard 280); and this doctrine so clearly laid down by Justice Nelson, is re-affirmed in Transportation Company v. Downer, 11th Wallace, 133, and the authority cited by your correspondent, of Graham v. Davis, 4 Ohio State 363, was relied on in the argument, and overturned by the decision of the supreme court.

So, that however there may be a conflict of authorities in the states upon this branch of the inquiry, the decisions of the Supreme Court of the United States are decisive of the question, when that question comes to be tried in a federal court. To argue, as your learned correspondent does, that the Adams Express Company is liable notwithstanding its special contract in this case, because it is liable for its employee, the Nashville Railroad Company, which, by the breaking of its bridge, caused the fire and the loss, is to loose sight of the point first made. I agree, and Judge Ballard admits in his opinion, that the express company, as a common carrier without special agreement limiting its liability, would be responsible for the loss by the Nashville Railroad Company, which it employed. But as an ordinary bailee for hire, which, respecting the loss by fire it had become by the special agreement, it is liable only for its own negligence, or that of its servants or agents. The express company was not negligent in transporting the package of money over the Louisville and Nashville Railroad, because that was contemplated by both parties, and was therefore authorized. It was not negligent in breaking the bridge, because it did not break it—it was not negligent in suffering it to break by its agents or servants, because the Nashville Railroad was neither its agent nor its servant.

In the case of Buckland *et al.* v. Adams Express Company, the court holds the company liable, because, under the evidence in the case, there was no special agreement to limit the carrier's common law liability, and they hold the common carrier liable as such for his sub-contractor. The decision of the court explicitly rests upon this ground. I quote from the opinion:

"On a consideration of the facts stated, it does not appear to us that the plaintiffs ever did agree that the merchandize in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manufactory, when the package was delivered to defendant's agent. It is not stated that the plaintiffs, or either of them, ever read the paper containing the alleged regulations, or one similar to it." 97 Mass. 132. And, without quoting from the other cases relied on for the contrary view, they will be found to rest upon the same ground, or to have ignored the distinction I have attempted to trace between a common carrier without special agreement, and a common carrier who has limited his responsibility to that of an ordinary bailee for hire. It remains only to examine the grounds upon which an ordinary bailee for hire is held responsible for damage caused by others. The matter is so well stated in Norton v. Wiswall, 26 Barbour. 620, that I will quote: "I am not able to see how any person can be made responsible for a particular transaction, or for the consequences flowing from it, unless he has been in some way personally engaged in it, or instrumental in bringing it about, or the relation between him and the person who inflicts the injury complained of, be that of partner, or master and servant, or some other involving the principle of agency. Where one is the master or principal of another, he is responsible for his acts within

the scope of his employment, because he has conferred authority upon the latter to do the act, and because he has the power and the legal right to control his conduct. Where one is the partner of another, he is liable for his acts within the scope of his partnership, because he has agreed to be so, and because the very nature and object of this relation imply that each acts within the authority and assent of the other. But where the parties stand towards each other simply in the light of contracting parties, having no relation towards each other which draws into operation the principle of agency, the rule does not apply."

I contend, therefore, that the express company is not liable for this particular loss, except as a forwarder or an ordinary bailee for hire would be, that is, for ordinary diligence in selecting proper means for the transportation of the goods. Brown v. Denison, 2 Wend. 593.

To sum up, I hold that the contract between the Bank of Kentucky and the Adams Express Company, is this: The express company undertook to carry this package of money, and to be responsible for its safety as a common carrier, but for the loss by fire the company expressly stipulated, that it would not be liable as a common carrier, but would only assume the liability of an ordinary bailee for hire. The package was destroyed by fire; the company was not guilty of negligence in selecting the L. & N. R. R., and the neglect in the breaking of the bridge was not the neglect of the company, or of its agents or servants. The railroad was an independent contractor, and not the agent or servant of the Adams Express Company, therefore the Adams Express Company was not negligent itself, or by its agents or servants, and is, therefore, not liable under its contract in this case. LEX.

Relative Importance of Case-Law.

English Case-Law may be divided for the purposes of the present enquiry into reported and unreported decisions.

As to the reported decisions, a distinction has been made regarding the value to be attached to different reports of the same case, and particularly as to whether or not the decision has appeared in what are known as the regular reports. Again, as to reported decisions, a further subdivision may be made, based upon the difference in the tribunals where the decision has been given, as for instance in Chambers, at *nisi prius*, in banc or in appeal.

Dealing first and briefly with unreported decisions, they are generally the refuge of the hard-pressed counsel, who, finding nothing to justify his position, adopts the expedient of invoking the shadowy authority of some traditional case "just in point." These sort of authorities have been jocularly called "*pocket-pistol law*," and the citation of them is hardly justified even by the necessities of counsel. The judicial estimate of such authorities is well indicated in the observations of the Master of the Rolls, in Knight v. Boyer, 23 Beav. 627. Referring to an unreported decision which had been cited, he remarks: "This case is not reported either in print or manuscript, but the case is cited from the proceedings in the cause filed in the chancery office. It is extremely difficult to rest safely on a case not reported by any competent person, when the grounds of the decision are to be picked out of the facts appearing on the recorded proceedings alone, when, if the case had been reported, it might have been found that, in truth, some other matter than that supposed was the principal cause of the dismissal of the bill. If the case had been seriously argued it would probably have been reported."

Next, as to the so-called unauthorized reports, the rule is now pretty well established that no judge will refuse to refer to, and act upon, a case simply because it does not appear in the regular reports. The decisions reported in the Law Journal, Law Times and Weekly Reporter, in advance of the regular series, are, and have long been, of great value to the profession. Indeed, in many cases, it has been matter of observation from the bench, that a report in the serials has elucidated the more obscure report of the same case in the official reports. In Francome v. Francome, 11 Jur. N. S. 123, Lord Chancellor Westbury observed: "I do not decline to follow the case cited because it is reported in the unauthorized reports. 18 Jur. 1051. It is of such materials that the law of England is made up, and I should be denying myself much valuable assistance in ascertaining what the law is, if I were to refuse to receive the citation of cases reported by barristers in those useful publications." See also, per Stuart, V. C., in S. C. 11 L. T. N. S. 666. In a recent decision of the full court of chancery, in this province, Bank of Montreal v. McFaul, 17 Gr. 234, the majority of the court gave effect to a decision reported only in the Weekly Reporter (Defries v. Smith, 10 W. R. 189), though the chancellor declined to follow it, and dissented from the judgment of the court. In Iansen v. Paxton, 23 U. C. C. P. 457, Richards, C. J., observes: "The Law Journal reports have generally been favourably spoken of, both by the profession and the bench."

We notice that the present master of the rolls, Sir George Jessel, has said that the Weekly Notes are not intended for citation as authorities, and he has refused to allow them to be cited before him. Attorney-General v. Cockermouth Board, 22 W. R. 620. But surely they are of worth at least equal to the Notes of Cases, which are frequently referred to in maritime and ecclesiastical causes, and their value as *pro tempore* guides, till the fuller reports appear, should not be overlooked.

Coming next to the regularly reported cases, perhaps those lowest and of least authority are *nisi prius* decisions. In many cases these rulings and holdings are necessarily given on the spur of the moment, and before publication require the careful pruning and consideration which Campbell gave to his reports. They are also useful when accompanied by the elaborate system of commentary, which Foster and Finlason append to the cases reported by them. But the judges themselves are not well satisfied with such cases being reported, and do not deem them of much value when cited before them *in banc*, as will appear from the few quotations which follow:

"As to the *nisi prius* cases, it would have been much better for the law if the crude opinions of judges at *nisi prius* had never been allowed to be quoted to those who are sitting *in banc*:" per Best, J., in Rowe v. Young, 2 B. & B. 185. "Very likely one's first thoughts at *nisi prius* may be wrong, and I am extremely sorry they are ever reported; and still more so that they are ever mentioned again:" per Bayley, J., in 1 Chit. R. 121. "A sad use is made of these *nisi prius* cases:" Gibbs, C. J., in Tompkins v. Wiltshire, 1 Marsh. 116. See per Best, C. J., in Johnson v. Lawson, 2 Bing. 86. "Buck v. Stacey, 2 C. & P. 465, has been approved of by eminent judges, and so lifted out of the sphere of a mere *nisi prius* decision:" per Lold Chelmsford, C., in Calcraft v. Thompson, 15 W. R. 387.

[To be continued.]

—[*Canada Law Journal.*

[Correspondence.]

A New Solution of the Railroad Question.

EDITORS CENTRAL LAW JOURNAL:—In the CENTRAL LAW JOURNAL for October 23, there is an article headed "A New Solution of the Railroad Question," into which is copied the argument of the editor of the Western Jurist, in favor of the exercise of the right of eminent domain over railroads, and in favor of individuals. The proposal is as follows: "Let any person who desires to run an engine, or a car or a train of cars, call into exercise this power of eminent domain, against or upon the railroad company; and, by the assessment of a jury, subject to revision by the courts, condemn the right of way over the railroad for his engine, car, or train." The plan might succeed as a practical measure, although it seems to me to be full of difficulty. An experienced railroad superintendent, however, would have an opinion on that point so much better than mine, because based upon knowledge and experience, which I have not, that I shall not trouble you with any remarks upon it. But there are some legal difficulties in the way which I imagine would make this private

train jump the track without performing the first journey, under this new right of eminent domain.

In the first place, the right of eminent domain can be exercised in favor of the public only, and not of an individual. Secondly, the acquisition of the right could not, by any method known to the law, expand into a power over station agents, telegraph operators, etc., without which the right would not be available. There are other difficulties, but, if these be real, they are as effectual as a battalion.

What is the right of eminent domain, and whence is it derived? It is the natural right which the sovereign has, *ex necessitate rei*, and for the purpose of maintaining the public welfare and preserving the existence of the state, to take private property for public use. This is, in substance, the definition given by Grotius, Puffendorf, and other writers on public law. Kent states it as "the power in the legislature to take private property for necessary and useful *public* purposes. Gardner v. Newburgh, 2 Johns. Ch. 165. I confess I do not see how this right can expand so as togive to any individual for his convenience, pleasure or profit, the rights which have heretofore been confined to the community at large, as an aggregate, and for the public welfare only. But, suppose a man should get the right to run a train on a railroad, how can it be run without the assistance of much of the personnel of the road; and how can that aid be condemned? In the old world, soldiers are quartered on families; and it is likely, from the progress we have made in breaking down private, civil and political rights, that we shall come to this by and by; but it does not seem to be very easy to compel a railroad company to entertain its rivals and to lend its officers to them. I cannot but believe that the attempt to compel railroad companies to accept for their services the compensation which the mob of gentlemen who compose some of our legislatures may have generosity enough to award them, will be decided by the court of last resort to be as illegal as it is unjust; and I do not see that this new right of eminent domain is a whit less objectionable in either regard. T. GEORGE.

Denver, Colorado.

REMARKS.—We do not perceive any legal difficulties in the way, such as the above correspondent suggests. It is true that the right of eminent domain can be exercised in favor of the public only, and not merely in favor of individuals; but the scheme proposed involves an exercise of this right in favor of the public, and not in favor of individuals exclusively. When an individual or corporation *represents the public*, then the right may be exercised in his behalf, for the benefit of the public. The first illustration of the right of eminent domain given by Chancellor Kent, is: "If a common highway be out of repair, *a passenger* may lawfully go through an adjoining private enclosure." 2 Kent Com. 338. But a "passenger" is but an individual." Nevertheless he represents the whole public, and his rights in such a case are the rights of the state, the nation, the sovereign. Therefore, it was held in Texas in a reported case which we cannot now quote, that a negro slave might lawfully drive his master's wagon over a citizen's land, where the road was impassable. The slave represented the master, and the master represented the public. The land over which all our railroads are built was condemned and taken from private land-owners, and given to private corportions, through the exercise of the right of eminent domain. Upon what ground was this done? The railroad corporation proposed to become a general carrier for the public, and the use for which it desired the land was hence a *public* use. In other words it represented the public. Precisely in this position will be the private train-owner in the case supposed. He represents the public. He proposes to become a general public carrier; and in this respect, represents the public in a much more enlarged and beneficial sense than a corporation which holds the rights of the public in an iron grasp. Or, if he carries simply for himself, and not for the public, then he represents the public in precisely the same sense as Chancellor Kent's "passenger" represents it upon a common highway. The exercise of the right of eminent domain proposed by the able editor of the Western Jurist, in the article above referred to, means simply that a government which could condemn the property of individuals to make a *public way* under the exclusive control of a corporation, can now condemn the property of that corporation to make a *common highway*, under its own control.

The objection that "the acquisition of the right could not, by any method known to the law, expand into a power over station agents, telegraph operators, etc," seems to us equally destitute of force. Whilst it is a familiar principle that the paramount authority of the government extends not only over all the property, but also over the persons and services of its citizens, yet the control of station agents, and telegraph operators would not be an incident of the right of eminent domain, but of the general *police power*, which in every government must reside somewhere, and which in our government resides either in the states or in federal union, accordingly as it has been apportioned by the federal constitution. If this power resides in the general government (and we are inclined to think it does), it is an incident of its power to regulate commerce between the states. But until exercised by the general government, it clearly may be exercised by the states, and we see no *legal* difficulties in the way of calling it into full and beneficial use. We imagine that it would not be necessary to "condemn," as our learned correspondent suggests, any of the *personnel* of the road. All that would be condemned, would be the road, the side-tracks and buildings—the real estate. The private train-owners would furnish their own train-men; and the general superintendent, train-dispatchers, switchmen, etc., would be agents of the government.

Entertaining these views, we ask pardon for suggesting that the train of our learned correspondent has already jumped the track. Every thoughtful person must see how vain and idle is the attempt to limit in advance, by nice legal barriers, the exercise of the right of eminent domain. Had this right been hedged in by legal precedents, our great railroads could never have been built In our government the right has but two limits, and they are of the most general character. 1. The *use* for which the property of the citizen can alone be taken, must be a *public* use. 2. It cannot in any event be lawfully taken without *just compensation*. The right itself is as broad as the public necessities in which it is founded, and as variant as the changing exigencies of society.

Law Schools.

For the last two or three months we have noticed a succession of articles in the CENTRAL LAW JOURNAL, and also in the Albany Law Journal, in manifest hostility to law schools. This hostility, we are bound to believe, is unconsciously entertained and not intended to be expressed; because the editor of the last named, says, it is an error to suppose "that the discussion means hostility to the law schools, and the editor of the first named, in his issue of the 28 ult., says:

"The opposition is not to law schools, but to too rapid graduation. Or, if it is found impracticable for law schools to lengthen their course of study, then the protest is against admitting their graduates to the bar on the faith of their diplomas, without further examination.

"We do not wish to be understood as attempting to lecture the law schools on this subject, while passing over in silence the conduct of the courts. We have good reason to believe that the conduct of many of the courts in the West and South, with regard to admitting candidates to the bar, has been remiss in the last degree. We are glad to be able to testify that the federal courts at St. Louis, and the circuit court of Saint Louis county, are conspicuous exceptions to this rule. But the painful fact is forced upon us that, as a general thing, the examination by judges, or by committees of the bar, of candidates for admittance to the bar, is a mere sham. We know of instances where a basket of champagne, or even a bottle of whiskey, has secured a favorable report, and where candidates have been admitted who have never read law a week, and who were even ignorant of the names of the leading elementary writers on the law. This state of things, which we believe is not new, but has existed in many quarters for years, is a scandal and a reproach to the legal profession. It inevitably enforces upon men of sense the conclusion that a profession which thus admits Tom, Dick and Harry to its honors, has very little honor, and is unworthy either of the confidence or respect of the public."

"Now, when it is remembered that both of the journals named have been making their war upon law schools on the alleged ground that the term of study required by them, which is practically but the equivalent of a single year, it is too short to qualify a student for the bar, the admission as to the course pursued and the practical results under the old system, which they advocate, are truly very refreshing. And just such results as are above stated, by our esteemed co-laborer in legal reform, were very often, if not generally realized in the State of New York, when the *rule* existed there in its greatest length, for which our Albany brother expresses his preference by saying, "the best pre-requisite to admission to the bar is a sufficient *term* of study."

The idea of a *term* of study has generally prevailed in this country for the last century, and in Great Britain for the last centuries, and that idea has wrought for us just the results so faithfully portrayed by our cotemporary in the above extract, and such results are the natural and legitimate fruits of the idea underlying the practice. It is essentially unjust and unequal, because one student by reason of previous advantages, superior talent, and greater industry, will accomplish more, when left to himself (as students in law offices are), in one year than others will accomplish in three years. A *term* of study is not requisite for admission to our colleges, for a certificate to teach, for the right to practice medicine, or to engage in any other business of life. Why, then, establish a term of study as requisite to entering upon the practice of the law? The fact is, that a term of study, and the study of law with a practitioner, have both been fully and effectually tried and found wanting. They are giving away, as they should, to something else, and that something else, which is now on trial, is the law school, and unless this new method is carefully nurtured and guarded, it too may be found wanting.

What we wish to do, is to foster and nourish our law schools, to encourage

and aid them, to carefully guard and elevate them so that the fullest advantage may be derived from them. To this end, we would advise every student at law to attend them; we would, as soon as practicable, have their course extended so as to embrace the studies, requiring at least two full years to fairly accomplish them; we would require a thorough and critical public and oral, examination (as well as a written one), occupying days, and made by a committee of recognized and competent *lawyers*, and not *mere* practitioners, and that the students should satisfactorily pass, before graduation; we would also, at the earliest practicable day, require a course of study previous to admission to the law schools, and that the standard fixed had been attained, should be demonstrated in an examination by a committee therefor, properly constituted; and we would constantly struggle to elevate this standard as well as the standard of legal attainments. Such a course would surely improve the aggregate of the profession, even if it reduced its number. The objection, sometimes raised to law schools, that a student cannot learn the *practice* of the law there, is fully met by the fact that they do (or may), there learn the *principles* of the practice, and that, ordinarily, a sufficient time intervenes between the admission to the bar and the obtaining of business, to enable them to learn by observation in the courts the *mere* practice. The experience of ages has demonstrated that the *place* to learn is in the *schools*—and this demonstrated fact will be found to apply with equal truth and force to the *law* as to any other science or elementary truth.—[*Western Jurist.*

Notes and Queries.

We ask the attention of our readers to the following queries. Our engagements have prevented us from giving them any attention:

I. PRACTICE—APPEAL FROM JUSTICE OF THE PEACE—CERTIORARI.

EAU CLAIRE, WIS., Oct. 28, 1874.

EDITORS CENTRAL LAW JOURNAL:—G. brought suit against B. in justice court, and the cause having been adjourned beyond ninety days, B. appeared only for the purpose of moving that the action be dismissed; and on the motion being denied, left; whereupon judgment was had against him. B. then brought a common law writ of *certiorari* to reverse the the judgment. While the writ was pending, and before hearing, B. appealed the case from justice to circuit court, as provided by statute. Afterwards, the writ was heard and the judgment in justice court affirmed. Appeal is still pending.

Quære.—Does the judgment on the writ prevent the appeal from being heard? Is the case finally disposed of by that judgment? What will be done with the appeal? And finally, does the taking of the appeal waive the defect cited by the writ, so as to make the writ and proceedings under it void? If so, is the judgment on the writ a void judgment also? Would like a reply with authorities through the journal. Yours truly,

A READER OF THE JOURNAL.

II. BANKRUPTCY—POWER TO COMPEL NON-RESIDENT BANKRUPT TO SUBMIT TO EXAMINATION.

MINNEAPOLIS, MINN., Oct. 26, 1874.

EDITORS CENTRAL LAW JOURNAL:—The following question is one that has become somewhat interesting in our district, and I submit it to you for an answer in your valuable journal:

A., within the last year, filed his voluntary petition, upon which he was subsequently declared a bankrupt, and an assignee appointed, etc. After the filing of the petition A. removed from the district in which such petition was filed, and has also as since remained away and refused to appear before the register of said district and submit to an examination, for the reason that he is out of the district, and cannot be compelled to appear.

Question.—Is there any way in which he can be compelled to appear before such register—for the purpose of an examination relative to his business, etc., and prior to his filing of such petition? If not, has the court any jurisdiction to compel him to appear before a register, or any person in the district in which he now lives, for the purpose of such examination?

It will be readly seen, that unless the court has power to do one or the other of these things, then the real object of the bankrupt law may be defeated.

An answer to this, I think, will be of some interest to the profession in general. I am very respectfully, W. E. H.

III. PURCHASE OF LEASED PROPERTY.

BLOOMINGTON, ILL., NOV. 7, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. and B. were partners as coal merchants. They were the owners of two sets of scales and coal sheds, for the handling and disposing of coal shipped to their order. These scales and sheds were constructed, by agreement, upon land belonging to the R. R. Company, and are therefore personal property. A. of the above firm, sold and conveyed to C., by sealed instrument, an undivided *one-half* of said scales and coal sheds, nothing being said as to the delivery or possession of said property. C. thereupon immediately formed a partnership with B., the remaining partner, for continuing the business of coal merchants. Within a few days after entering into this partnership, C. bought B.'s interest in the above mentioned property and business, and should now have had full control and possession of said property and business, but for one other circumstance. Prior to the purchase made of A., and entirely unknown by C., A. and B. had leased to the firm of S. and S. the above described property, which lease does not expire until six months after the sales made to C. S. and S. have possession of the property, and, of course, will not give it up. Can C. recover in an action of covenant (or in the state of Illinois, in assumpsit), against A., damages for the non-delivery of possession of said property. C. learned of the contract with S. and S. after he purchased of A., but before he bought B.'s interest.

Should like a reply through the JOURNAL. C. D. M.

Book Notices.

LIVES OF THE LORD CHANCELLORS OF ENGLAND. By LORD CAMPBELL. New Edition. Edited by John A. Mallory, of the New York bar. Illustrated. New York: James Cockcroft & Co. For Sale by Soule, Thomas & Wentworth, St. Louis.

We have before adverted to this illustrated edition of Lord Campbell's celebrated work as the best edition which has ever appeared in this country. Since our previous notice, Vols. 3, 4 and 5, have been issued. Vol. 3 includes, *inter alia*, the life of Lord Bacon, and Lord Clarendon, with portraits of each; Vol. 4 gives the life of Lord Jeffreys, and that of the highest model of English judges and statesmen,—Lord Somers, with a portrait, while Vol. 5 concludes the life of Somers, and gives those of Cowper, Macclesfield and King. The remaining volumes will appear in a short time, and we unreservedly recommend this edition to our readers. Every lawyer is a better lawyer by reading these interesting biographies, which trace the history of the English law which is in truth like English and American Institutions, a *growth*, and it can best be learned by studying it historically.

CAUSES CELEBRES. TRIAL OF QUEEN CAROLINE. Three Vols. New York: James Cockcroft & Co. 1874. For Sale by Soule, Thomas & Wentworth, St. Louis.

The famous trial of Queen Caroline is one of the most dramatic, and at the same time, one of the most instructive in English history. It occurred under one of the chancellorships of Lord Eldon, and among the counsel for the government was Gifford, afterwards Lord Gifford, and Master of the Rolls; Copley, afterwards Lord Lyndhurst, Chancellor of England, and the Celebrated Parke, afterwards Lord Wensleydale, and a distinguished judge in the court of Exchequer.

The array of counsel for the Queen was, if possible, yet more eminent. It was headed by Brougham, and included Denman, afterwards Lord Chief Justice of England, Wilde, afterwards Lord Truro and chancellor, and Lushington, afterwards famous for his decisions in the high court of admiralty. The history of this trial will prove quite as interesting to the general as to the professional reader. The latter will quite agree with Lord Campbell, that the "law of evidence has been much enriched by the decisions in the Queen's case," while all intelligent readers cannot fail to be struck with admiration at the skill displayed in the examination of the witnesses by the counsel, and particularly at the intrepid, glowing, indignant eloquence of Brougham and Denman. If we except, possibly, some of the speeches of Erskine, whom we regard as the greatest master of frorensic eloquence that ever spoke the English tongue, the speeches in defence of the Queen undoubtedly may be classed as among the greatest examples of the skill and eloquence of the bar.

This is an elegant edition, printed on tinted paper, is put at a low price, and we warmly commend these volumes to our readers.

LAW OF FIRE INSURANCE. By HENRY FLANDERS. Second Edition. Philadelphia: Claxton, Remsen & Haffelfinger. 1874. pp. 668.

The profession are quite well acquainted with this work through the first edition. It is confined to Fire Insurance, and this we regard as a merit, for although the different kinds of insurance are in many respects similar, and therefore susceptible of combined treatment, yet the dissimilarity in important particulars, as well as the great accumulation of material, makes a separate and distinct discussion desirable. This work is not so elaborate and full as many. It aims to state succinctly the *principles* of the cases without going into detail and exhaustive illustration. In this respect it is like Byles on Bills, and it bears about the same relation to some more elaborate works on the same subject as Byles does to Parsons.

The preference of the body of the profession is for the more practical works, which give in the notes the substance of leading cases and illustrations and critical discussions and comparisons of adjudications; and yet it is refreshing to the busy practitioner and the tired judge, to see the law on a given point neatly summed up or stated by the author with a mere citation of the cases upon

which the text is based, if the author be one in whose ability and carefulness he feels that he can rely. The second edition contains many new cases, and with some omissions, generally of minor consequence, brings the law of Fire Insurance fully down to date.

Summary of our Exchanges.

The Legal Intelligencer, for November 6, contains some interesting decisions. The following are by the Supreme Court of Pennsylvania: Taney v. Long: The undue influence which would be sufficient to destroy a will must be something more than mere importunate persuasions.

Commonwealth v. Trout: A decree or judgment may only be impeached in a collateral proceeding for fraud or collusion.

Hepburn v. Mans: In covenant, a plaintiff may maintain several actions for different instalments. Attachment of a debt does not prevent the recovery of judgment; it only suspends execution.

Chambersburg Woolen Co. v. Chambersburg Manufacturing, etc. Association: The capital stock of a corporation is a trust fund for the payment of its debts, and, therefore, a sale, by an insolvent corporation, of its real estate to a stockholder for stock, makes such purchaser liable for its value in cash to the corporation's creditors.

McFerran v. Mont Alto Iron Company: Clear proof of contract of purchase, the quantity of land sold, payment of purchase-money, and long continued possession, meet the requirements of the statute of frauds.

It also publishes a very full opinion of Mr. Justice Strong (with whom McKennan, Circuit Judge, concurred), in the matter of Jay Cooke & Co., bankrupts. The following is the syllabus: After a bankrupt's estate has been placed in the hands of a trustee, under the direction of a committee of creditors, by virtue of the 43d section of the bankrupt act, the court cannot, in the absence of fraud, call a meeting of creditors to control the committee's action.

The Chicago Legal News, for November 7, publishes an interesting decision of Mr. Circuit Judge Drummond, under § 39 of the bankrupt act, as amended. The case is *Re* Williams and McPheeters. The petition was filed on the 22d of June, the day of the passage of the amendment to the bankrupt law, and one-fourth in number and one-third in value of the creditors were not parties to it. It was afterwards, with the consent of the court, amended, and the required number of creditors became parties to it. *Held*, that it was competent for the court to permit the amendment to be made, and when made, that it related back to the commencement of the proceedings in bankruptcy, and gave effect to the action of the court. It was also held that the bankrupt court having jurisdiction of the case, possessed authority to protect the debtor from arrest in a state court. The learned judge said: "The amendment should be reasonably construed, and if possible, so as not to destroy, or even impair, any proceedings which had been already commenced, or which might be commenced in good faith, and in ignorance of the passage of the amendment on that particular day, the 22d of June." A similar question came before Mr. District Judge Withey in *Re* Burch. 10 N. B. R. 150, and a different view was taken. In that case the petition was filed on the 25th of June, the third day after the passage of the amendatory act, but before the petitioner had been advised of its passage. It was held that the petition could not be amended so as to make the allegations required by the 39th section, as amended, with reference to the number and value of creditors; that those allegations not having been made in the first instance, the court had no jurisdiction, and the petition was accordingly dismissed.

The Legal News shows its enterprise in publishing Tilton v. Beecher, Criminal Court of Brooklyn, N. Y., in which Neilson, J., considers the question whether a defendant in an action of tort may require a bill of particulars, and refuses the application.

It also publishes a Kentucky case, Spratley v. Mutual Benefit Life Ins. Co., which discusses the effect of the war on southern policies of life insurance.

The Washington Law Reporter, for October 27, publishes the case of the District of Columbia v. Herlihy, Supreme Court of the District of Columbia, General Term. In this case an information in a criminal case charged the defendant with keeping a tippling house "at house No. 1601 Q. street," in the city of Washington, and, on the trial of the cause before a jury, it was proven by the witnesses for the prosecution that defendant committed the offence at No. 1601 12th street. The attorney for the district then asked permission of the court to amend the information by striking out the house, number and street laid in such information, which was allowed, the defendant excepting. *Held*, that such amendment could not be made at the trial of the cause; that where a criminal information is required by statute to be under oath, it cannot be amended at the trial of the cause in any manner affecting the charge against the defendant; that the act of assembly, providing that technical or clerical errors may be amended at the trial, extends only to formal or ministerial mistakes.

It also publishes Campbell v. American Popular Life Insurance Company, same court, with the following syllabus: A person obtaining a policy of life insurance may agree that the surgeon-in-chief of the company shall decide whether one of the conditions upon which the policy issued has been complied with, and his decision will be binding.

Where one of the conditions in the policy is that the insurance money is to be paid, if, in the opinion of the surgeon-in-chief of the company, the party insured did not die of intemperance, nor by any disease produced or aggravated by intemperance, it was held that this was a valid condition precedent, and that its performance must be averred or its non-performance accounted for.

If, however, the surgeon is also a stockholder whose dividends are affected by the payment of claims, and the fact of such interest was concealed by the company from the party insuring at the time the policy was made and accepted, it is a sufficient excuse for the non-performance of such condition.

The Washington Law Reporter, for November 3, reports the case of Hoss v. Wilson, Supreme Court of the District of Columbia, with the following syllabus:

The plaintiff entered into a contract by which he agreed to employ the defendants in the prosecution of a number of claims against the United States, which he held as agent for other persons, and he was to have one-third and the defendants two-thirds of the fees. It was then stipulated, "that in the cases of T. J. Coyan, Nicholas Culliton and P. Moran, the fees shall be equally divided between the parties hereto." *Held*, that as to the cases here specifically mentioned, the agreement was independent, and not affected by the stipulation in relation to other cases.

It is no defence to a bill charging defendants with having collected the claims specified in the agreement, and praying for a discovery and an account, to set up that plaintiff had made false representations at the time of entering into the contract, as to the amount and character of the other claims which he would probably procure, and that he had failed to obtain other cases for the defendants to prosecute.

When a case involves both discovery and account, it is within the jurisdiction of a court of equity.

Also the interesting case of Mitchell v. Seitz, same court, expounding the Married Woman's Property Act of the District of Columbia. The syllabus is as follows:

1. Where a married woman acquired title to real estate which was paid for by money belonging to her husband, she cannot hold said property as against his creditors.

2. Where a purchase of real estate is made in the name of a married woman, and there is no proof that she has separate means or funds, and the husband is carrying on a successful business and not paying his debts, the presumption is that the purchase was made by funds which he had furnished.

3. The earnings of a married woman are still the property of the husband notwithstanding the act of Congress permitting married women to obtain and hold property in this district.

The Pittsburgh Legal Journal, for November 4, reports *Re* Andrews & Jones bankrupts, in which the sum of one hundred dollars was allowed solicitors of involuntary bankrupts as reasonable compensation for preparing their individual and partnership schedules.

It also publishes a report of a charge of Presiding Judge Hampton to a jury, in Atvater v. Wood, which was an action for injuring plaintiff's land, by excavating a sand-pit, so that some of plaintiff's land caved into it, which sand the defendant generously carted off and sold. The case is said to have been affirmed by the supreme court.

The American Law Times Reports, contains a number of interesting decisions. Those which we have not already noticed as appearing in the weekly law periodicals, have the following head-notes:

Indianapolis and St. Louis Railroad Co. v. Galbreath (to appear in 63 Ill.):

In an action against a railroad company, to recover damages alleged to have been sustained by the plaintiff, through the carelessness and negligence of defendant's servants and agents in running a train of cars upon their track, it appeared that while, in the night time, the plaintiff was walking on the track in a village, at a place where the same was so used, without objection, by all classes of persons, he was overtaken and struck by an engine without any headlight, running at a high rate of speed, there being no bell rung, or whistle sounded to indicate the approach of the train, and the plaintiff hearing or seeing nothing of it until he was struck. *Held*, that the negligence of the plaintiff in walking on the track, if it was negligence, was but slight when compared with the gross and criminal negligence of the defendant in so running a "dark train," at a high rate of speed through the village, without signalling its approach.

Merrifield v. City of Worchester (to appear in 110 Mass.):

If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business, as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction, or unreasonable use of the sewers, or to the negligence or other fault of the city, in the care or management of them.

Murphy v. The Commonwealth (to appear in 24 Grattan):

1. The act of March 30, 1871, Sess. Acts 1870–1871, p. 332, does not give justices of the peace jurisdiction to try a case of felony; and the conviction and punishment of a party by a justice for an assault and battery will not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice.

2. If the accused has been indicted and convicted for a mere assault and battery in the county court having jurisdiction of such offence generally, the conviction will not be a bar to an indictment for a felony, in the perpetration of which the assault and battery was committed.

3. On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made, was asked if he did not tell his wife that the prisoner acted only in his own defence. 1. The answer to the question may tend to criminate himself, and the testimony is inadmissible. 2. It required him to state a communication supposed to have been made by him to his wife, which, if made, was a confidential communication, and which he was not bound to disclose.

4. Where a question is put to a witness which he answers, and which relates to a collateral matter not connected with the subject of the prosecution, his answer to that question is conclusive, and cannot be contradicted.

5. In this case, after the witness was asked the question whether he did not state to his wife that the defendant had acted only in his own defence, and he had answered the question denying that he had done so, the wife of the witness was introduced to prove the statement was made to her. She is not a competent witness to prove it, though at the time it was alleged to have been made, they were living apart from each other, but not divorced.

6. A man is taken to intend that which he does, or which is the natural and necessary consequence of his own act. Therefore, if the prisoner wounded the prosecutor, by the deliberate use of an instrument likely to produce death under the circumstances, the presumption of the law is that he intended the consequences that resulted from said use of said deadly instrument.

7. Malice may be inferred from the deliberate use of a deadly weapon, in the absence of proof to the contrary.

8. Where there are two counts in an indictment for a felony, and there is a general finding by the jury of "guilty," if either count is good, it is sufficient.

Ford v. Fitchburg Railroad Co. (to appear in 110 Mass.):

One employed by a railroad corporation to drive a locomotive engine over its road, may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents. One employed by a railroad corporation to drive a locomotive engine over its road, is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men, and procure assistance, whenever any defect was detected in an engine that would make it in his judgment unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe.

Hayner v. Smith (to appear in 63 Ill.):

1. Since the act of 1861, in a suit to recover rent under a lease executed by a married woman on her own separate property, it is error to join her husband as plaintiff in the action.

2. Where a lessee is, by his lessor, wrongfully evicted from a portion of the demised premises, he is thereby excused from the payment of any of the rent, although he remains in possession of the remaining portion of the premises to the end of the term.

3. But, to constitute an eviction, there must be more than a mere trespass by the landlord. There must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises—the question of eviction or no eviction depending upon the circumstances, and being a matter for the jury to decide.

4. Some acts of interference by the landlord with the tenant's enjoyment of the premises may be mere acts of tresspass, or may amount to an eviction, the question whether they partake of the latter character depending upon the intention with which they are done—if clearly indicating an intention on the landlord's part that the tenant should no longer continue to hold the premises, they would constitute an eviction.

Minturn v. Smith, Circuit Court of the United States, District of California, Sawyer, Circuit Judge, Mr. Justice Field concurring:

1. A general statute authorizes a tax-collector for state and county taxes, to execute a deed upon a tax-sale, and further provides that such deeds shall be *prima facie* evidence of certain facts recited therein, and conclusive evidence of the regularity of the proceedings in all other respects. A subsequent statute provides that a town tax in a certain town shall be assessed and collected at the same time, and in the same manner, as provided by said general act, and confers upon the town treasurer all the powers exercised by the tax collector of the state and county taxes under the general act, but makes no provision as to the effect of the tax deed executed by the town treasurer. *Held*, that such deed will not be *prima facie* evidence of the regularity of the prior proceedings.

2. A tax deed which the statute does not make *prima facie* evidence of the regularity of the assessment and sale, does not cast a cloud upon the title.

3. An injunction will not be granted to restrain the collection of a tax, when the deed issued upon a sale for taxes would not cloud the title.

The Legal Gazette, for October 30, continues to publish decisions of the Supreme Court of the United States. These decisions appear to be but slightly in advance of the current volumes of Wallace's Reports, and are therefore almost destitute of value to the subscribers to those reports. Thus Bartholow v. Bean, published in the present number of the Gazette, was published by us several months ago, and is reported in 18 Wallace, 635, which has been for some time in the hands of the profession. Kitchen v. Rayburn Packet Co. v. Sickels, and Burke v. Miltonburger are the other cases which it prints in this number.

The Legal Gazette, for November 6, publishes Head v. The University, Supreme Court of the United States, October Term, 1873, with the following syllabus:

Where, in a university of learning belonging to the state, and which the state was in the habit of governing through curators appointed by itself (such as the University of Missouri), a person was appointed by the curators a professor and librarian for six years from the date of his appointment, "*subject to law*," *held*, that the legislature could vacate his office, appoint new curators, and without fault on the part of the professor assigned, order a new election of a professor to the same professorship, and of a librarian, before the expiration of the six years.

Also Butt v. Ellett, same court, with the following head-notes:

1. Although an instrument which purports to mortgage a crop, the seed of which has not yet been sown, cannot at the time operate as a mortgage of the crop, yet when the seed of the crop intended to be mortgaged, has been sown and the crop grows, a lien attaches.

2. When property which the owner has leased is sold at sheriff's sale, on execution against the owner, the sheriff's deed conveys the reversion and the rent follows as an incident.

3. Accordingly, where a lessee of a cotton plantation, made in January, 1857, in order to secure the rent, mortgaged the crop of that year. *Held*, that although the seed of that crop had not yet been sown, a purchaser of the land at sheriff's sale, could charge as trustee of it for him, a person to whom the tenant had transferred the crop, after it had grown and was gathered, such purchaser having taken with notice of the landlord's mortgage.

Also Aicardi v. State, with the following syllabus:

Whether the legislature of a state has authority, under the constitution of the state, to pass a particular statute; what is the true interpretation of any statute passed by it for a purpose specified, and what acts will be justified under the statute, are matters which lie exclusively within the determination of the highest court of the state, whose judgment is final.

Also *Re* Jay Cooke & Co., which we have noticed above in the Legal Intelligencer.

Also Clarke v. Delaware & Hudson Canal Co., Supreme Court of Rhode Island, in which the following points are ruled:

1. A case can be removed from a state court to the United States court, even after a trial has been had and the jury disagreed.

2. The cause should be removed as of the date when the motion for removal was made.

—We learn from a private source which is authentic, that the question of revising the general orders in bankruptcy has been referred by the judges of the supreme court to a committee of members of the court. The question involves much consideration, and it is not likely the committee will report until after New Year; and it is also probable that no final action will be had by the court until next spring.

Legal News and Notes.

—THE Daily Register, in a recent article, enumerates the following living authors at the New York bar:

Austin Abbott, Benj. V. Abbott, T. G. Shearman, A. A. Redfield, Geo. Ticknor Curtis, Charles Crary, Henry Whittaker, R. D. Benedict, E. C. Benedict, W. J. Haskett, D. S. Riddle, A. R. Dyett, Horace Andrews, Chas. Francis Stone, Clarence A. Seward, Amos G. Hull, J. H. Hubbard, Geo. H. Yeaman, David Dudley Field, Montgomery H. Throop, Joseph D. Fay, Dorman B. Eaton, R. S. Guernsey, Jas. W. Gerard, Jr., Henry C. Adams, John Townshend, N. Howard, Jr., William Tracy, Geo. Bliss, Jr., H. D. Sedgwick, Joshua M. Van Cott, Isaac Dayton, Bernard Boelker, G. F. Langbein, J. C. J. Langbein, S. H. Turnbull, Stephen D. Law, A. W. Gazzam, R. H. Moses, Jr., Thorndike Saunders, H. C. Ulman, Judges Blatchford, C. P. Daly, Monell, McAdam, Lawrence, Geo. Shea, M. B. Field; ex-Judges T. W. Clerke, C. K. Smith, Henry E. Davies, Henry Hilton, Samuel Jones, J. C. Spencer Murray Huffman; ex-Surrogate Gideon J. Tucker.

—ON Thursday, October 15th, the Court of Arbitration, which was authorized by an act of the New York legislature, in April last, was formally opened, at the rooms of the New York Chamber of Commerce. The jurisdiction of this court is limited to the Chamber of Commerce of New York city, any member of that body having the right to call another member before the court by a "summons," who shall be deemed to have consented to the trial of the case unless he files an "objection to jurisdiction." Non-members of the Chamber may bring a case before the court by a "submission." Expenses, except in case of a re-hearing, will be borne by the Chamber as a body. Submission to the court is thus made a voluntary matter, but after going before it parties are to be bound by its action, and there is no appeal, as the act now stands. The idea is to provide a tribunal for a speedy and inexpensive method of deciding disagreements without the necessity of enduring the law's delay; the idea is an old one in Europe, where it has been found very successful in practice, and the results of the experiment here will be watched with great interest.—[*The Financier.*

—KULLMAN, who attempted to assassinate Bismarck, has been tried, convicted and sentenced. He made a cool and circumstantial confession. He endeavored to kill Bismarck because the latter threatened the Church with ruin. This left the court nothing to do but to determine the question of his criminal accountability. On this point medical testimony was taken. Dr. Reinecke testified that he did not consider Kullman a religious or political fanatic, nor that he possessed a natural predisposition to crime; neither was he a common murderer. His powers of comprehension of right and wrong are unimpared; but on the other hand, he inherited a deficiency of moral strength. His maternal grandfather committed suicide, his mother died deranged, and his father was an habitual drunkard. These facts, Dr. Reinecke thinks, are calculated to produce in Kullman a want of independence in forming opinions, susceptibility to external impressions, coldness of heart, vanity and tendency to violence. He is therefore of opinion that although Kullman may be considered an accountable being, his nature nevertheless possesses a hereditary morbid disposition calculated to affect his free will. Herr Hubrich, director of a lunatic asylum, deposed that while the prisoner was very deficient in moral sense, yet his free will was so triflingly affected that there was scarcely any ground for mitigation.

Testimony was then taken as to the religious influences to which he had been subjected. The prisoner then related the story of his life. The president of the court summed up the medical testimony to the effect, that at the time of the assassination, as well as at present, Kullman was accountable for his acts to but a limited degree. Kullman was found guilty as charged in the indictment, and sentenced to imprisonment for fourteen years in the house of correction, and ten years' suspension of his civil rights, and to remain under surveillance for life. These statements are given by us as they appear in the telegraphic report. It appears to have been a jury trial. It appears to have been conducted with a dignity and decency that would put to shame many such trials in America and in France. The man was evidently sane, the sentence just and not too severe, considering the nature of the crime. That part of it which places him under surveillance for life seems eminently proper. Such men ought to be watched in every government which cares for the lives of its citizens. But what strikes us most, is the broad range of the evidence which went over the man's whole life—in such striking contrast with the narrow and exclusionary rules adhered to with such bigotry by the courts of the common law.

—THE Albany Law Journal reminds us that William Cullen Bryant, whose eightieth birthday was celebrated on the 3d instant, was once a legal practitioner, and represented the plaintiff in the case of Bloss v. Tobey, 2 Pick. 320. This reminds us that Noah Webster, whose story about the lawyer's bull goring the farmer's ox, called forth some animadversions from the same journal a few months ago, was also a legal practitioner in his younger days, and at one ime a judge. In his story about the bull and the ox, he aptly portrayed human nature, which is the same, whether it develop itself through the character of a lawyer or any other. It may not be out of place to note that General Sherman once tried to practice law, at Leavenworth, Kansas, it is said; but in his first case was so overwhelmed by the low arts and vile rhetoric of a shyster, that he threw up the business in disgust. He probably entertains an opinion of lawyers very like that of the great lexicographer.

—MR. SERGEANT COX recently read a paper before Repression of Crime Section of the Social Science Congress, at Glasgow, in which he argued in favor of cumulative sentences in cases of inveterate criminals. He sums up his views, as follows:

"1. The object of punishment is, first, to deter the offender from repeating the offence, by fear of the consequences; secondly, to deter others from offending by the knowledge of the pain they will incur if they do so.

"2. For this purpose the law should affix to all offences, below a certain high class of crimes, a scale of penalties increasing at a fixed ratio with every repetition of the same offence.

"3. The law should also impose some increase of sentence upon a conviction for any offence of the same nature, as, for instance—in larceny, for any crime in the nature of dishonesty; in assault, for any offense involving violence, and so forth. (This the law has already partially accomplished.)

"4. In all cases there should be vested in the court a large discretion for mitigation of punishment, and here I would suggest whether it would not be desirable to make some change in the present practice of sentences so as to require the judge to say to this effect: 'I now pronounce the sentence of the law, which for your offence is (naming the statutory penalty). But by virtue of the power given to me to mitigate that sentence, for the reasons I now state to you, I reduce your punishment for that offence to,' etc. Much benefit would accrue from such a repeated publication of the punishment attached by the law to offences, and no small advantage would be secured by the judge being thus required to state publicly his reasons for its mitigation.

"5. One of the strongest recommendations for the adoption of a scale of cumulative punishments, is that it precisely apportions the remedy to the disease."

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

Voluntary Bankruptcy—Vacating Proceedings on Account of Insanity.—In *re* Alonzo Murphy, 10 N. B. R. No. 1, the following opinion was delivered by Mr. District Judge Trigg: Creditors of Alonzo Murphy file a petition against him, asking his adjudication in involuntary bankruptcy, sometime in the year 1872. The order to show cause was served on him, and, on his default to answer, he was adjudicated a bankrupt, and his property turned over to an assignee. The property in the hands of the assignee has never been distributed among the creditors. Alonzo Murphy now comes in with a petition, supported by affidavits, showing that he was *non compos mentis* at the time the debts of petitioning creditors were created, as well as at the time of the institution of proceedings, and the adjudication of bankruptcy, and until a very recent period. Under this state of facts, I cannot refuse the application to set the default and subsequent adjudication aside, and to allow Alonzo Murphy to show cause why he should not be adjudicated a bankrupt.

NOTE.—A jury trial was subsequently had, and a verdict of insanity at the time of the adjudication of the lands. It is not pretended that there is found any express reservation in either, or all, of these.

Admiralty—Salvage—Pilotage—Ambiguous Signals.—In The Racer, 30 L. T. N. S. 904, the Admiralty Court of the Cinque Ports decided a very interesting question relative to salvage. It appeared that a signal was made by the Racer; the signal was a Union Jack with a portion of the ensign torn away and hoisted above her topgallant-yard. The Stag sent a boat to the Racer, and one of the crew went on board and helped run her into the nearest port. Sir R. Phillimore, who delivered the opinion, said the signal raised by the Racer was an ambiguous one, and would be construed according to the condition of the vessel when boarded. And on the question whether the service rendered was purely pilotage or partook of the nature of salvage, the judge was of opinion that it was the latter, as the condition of the Racer was such that her master thought it best to put into the nearest port for repairs. For other cases bearing on the subject of ambiguous signals, see The Heding, Spinks, E. C. C., and Adm. 21; The Felix, id., note; The Little Joe, Lush. 88; The Enterprise, 2 Hagg. Adm. Rep. 178, note.—[*Albany Law Journal.*